

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/1. INTRODUCTION/801.  
Scope of title.

## **DAMAGES (**

### **1. INTRODUCTION**

#### **801. Scope of title.**

This title deals mainly with the general principles of the law of damages and the questions which commonly arise in the application of those principles<sup>1</sup>. It concentrates primarily on the damages awardable in tort<sup>2</sup>, for breach of contract<sup>3</sup> and breach of bailment<sup>4</sup>, and in equity<sup>5</sup>. Damages for particular torts or breaches of contract are considered by way of example and illustration but are more fully treated under appropriate titles elsewhere in this work<sup>6</sup>.

1 As to damages in cases having a foreign element see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 22. As to the recovery of sums payable in foreign currency see PARAS 1132-1144 post.

2 See PARAS 851-940 post; and generally TORT.

3 See PARAS 941-1087 post; and generally CONTRACT.

4 See PARAS 1088-1108 post; and generally BAILMENT.

5 See PARAS 1120-1131 post; and generally EQUITY.

6 As to the civil liabilities of owners and operators of aircraft see AIR LAW vol 2 (2008) PARA 647 et seq. As to damages in actions of deceit for misrepresentations in a company prospectus see COMPANIES vol 15 (2009) PARA 1086 and for damages for infringement of copyright etc see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARAS 419, 530-531, 703-704, 708, 710. As to damages recoverable against a carrier see CARRIAGE AND CARRIERS vol 7 (2008) PARA 773 et seq; as to damages in connection with building and engineering contracts see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARAS 69, 72-73, 172-174; as to damages in connection with misrepresentation see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 789 et seq; and PARAS 1109-1110 post. As to damages in contracts for the sale of goods see SALE OF GOODS AND SUPPLY OF SERVICES and PARA 1056 post. As to the damages recoverable where a plaintiff affirms a contract which could have been rescinded by reason of the defendant's breach, and as to the effect of an exclusion clause in a contract when the contract has been rescinded for breach see CONTRACT vol 9(1) (Reissue) PARA 986 et seq. See also generally BAILMENT; CARRIAGE AND CARRIERS; LIBEL AND SLANDER; NEGLIGENCE; SALE OF GOODS AND SUPPLY OF SERVICES; SHIPPING AND MARITIME LAW.

### **UPDATE**

#### **801-814 Introduction**

The provision of claims management services is regulated by the Compensation Act 2006 Pt 2 (ss 4-15): see LEGAL PROFESSIONS vol 65 (2008) PARA 553 et seq.

Neither the Secretary of State nor any of the designated judges (ie the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division or the Chancellor of the High Court) (see generally COURTS) are liable in damages for anything done or omitted in the discharge or purported discharge of any of their functions under the Courts and Legal Services Act 1990 Pt 2 (ss 17-70) (see generally LEGAL PROFESSIONS): ss 69(1), 119(1) (s 69(1) amended by SI 2003/1887; and prospectively repealed by Legal Services Act 2007 Sch

21 para 92, Sch 23; definition of 'designated judges' in Courts and Legal Services Act 1990 s 119(1) amended by Constitutional Reform Act 1990 Sch 4 para 216).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/1. INTRODUCTION/802. 'Damage' and 'damages'.

## 802. 'Damage' and 'damages'.

'Damage' may be defined as the disadvantage which is suffered by a person<sup>1</sup> as a result of the act or default of another. 'Injuria' is damage which gives rise to a legal right to recompense; if the law gives no remedy, there is 'damnum absque injuria', or damage without the right to recompense. The meaning of 'damage' in a statute is a matter of construction<sup>2</sup>. When determining the damage suffered by a plaintiff, the courts will look at the reality of the situation to assess the loss which has in fact been sustained<sup>3</sup>.

'Damages' are the pecuniary recompense given by process of law to a person for the actionable wrong that another has done him<sup>4</sup>. Damages may, on occasion, be awarded where the plaintiff has suffered no ascertainable damage<sup>5</sup>: damage may be presumed<sup>6</sup>. Actions claiming money, other than those based on contract, tort or equity, are not actions claiming damages, and consequently fall outside the scope of this title. Actions claiming money under a statute are not actions for damages unless the action is also an action in tort or for breach of contract<sup>7</sup>.

1 As to persons who may sue and be sued see CIVIL PROCEDURE.

2 See *Horbury v Craig Hall & Rutley* [1991] EGCS 74 (where an action was brought under the Limitation Act 1980 s 14A (as added). It was held that it is essential to distinguish between 'damage' and 'damages'. For the purposes of the Limitation Act 1980, all loss flowing from the defendant's negligent action constitutes 'damage' giving rise to a single cause of action for 'damages', notwithstanding the fact that different aspects of the damage may be discovered at different times. See further LIMITATION PERIODS vol 68 (2008) PARA 982.

'Expenses' of lifting a sunken ship, recoverable under a local Act, have been held not to be 'damages': *Stonedale No 1 (Owners) v Manchester Ship Canal Co, The Stonedale No 1* [1956] AC 1, [1955] 2 All ER 689, HL; see further PARA 814 note 13 post. In the Harbours, Docks and Piers Clauses Act 1847 s 74, the words 'damage done by such vessel ... to the harbour, dock or pier' are confined to physical damage to the harbour etc: *Workington Harbour and Dock Board v Towerfield (Owners)* [1951] AC 112, [1950] 2 All ER 414, HL; *Stonedale No 1 (Owners) v Manchester Ship Canal Co, The Stonedale No 1* supra. As to statutory interpretation see STATUTES vol 44(1) (Reissue) PARA 1369 et seq.

3 See *Ward v Newalls Insulation Co Ltd* [1998] 2 All ER 690, (1998) Times, 5 March, CA (plaintiff in personal injuries action was a successful businessman who, for tax purposes (and with the agreement of the Inland Revenue) divided the profits of the business with his wife; the defendant's argument that the damages to be awarded for loss of earning capacity should be limited to the amount which, for tax purposes, the plaintiff was deemed to take out of the business was rejected: in reality, the wife did not contribute to the business, and her share of the profits was notional and related to the plaintiff's work and was therefore his loss).

4 See Co Litt 257a; 2 Bl Com (14th Edn) 438; *Jabbour v State of Israel Absentee's Property Custodian* [1954] 1 All ER 145 at 150, [1954] 1 WLR 139 at 143 per Pearson J; and see PARA 803 et seq post.

5 In such a case, damages awarded will be nominal, in recognition of the wrong which has been committed; as to nominal damages see PARA 813 post.

6 As to the necessity of proving actual damage see PARA 805 post.

7 Eg claims under the Social Security Acts or for unfair dismissal or redundancy under the Employment Rights Act 1996. The Fatal Accidents Act 1976 expressly makes claims for loss of dependency torts, with the result that such actions are for damages, as are claims under the Sex Discrimination Act 1975 and the Race Relations Act 1976.

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## **802 'Damage' and 'damages'**

NOTE 3--See also *Guild (Claims) Ltd v Eversheds (a firm)* [2000] All ER (D) 986 (negligent omission not causing claimant any loss).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/1. INTRODUCTION/803.  
Damages distinguished from other kinds of money payment.

### **803. Damages distinguished from other kinds of money payment.**

Damages as defined in the previous paragraph are distinguishable from debt, and from a sum payable under contractual liability to pay a sum certain on a given event (other than breach), but include sums payable under claims for a reasonable price or remuneration for goods sold or services rendered<sup>1</sup> and under claims under an insurance policy when the quantum of damage has been proved<sup>2</sup>.

Damages are also distinguishable from compensation<sup>3</sup>, from a penalty<sup>4</sup> and from costs<sup>5</sup>.

1 As to claims for a reasonable price or remuneration see RESTITUTION vol 40(1) (2007 Reissue) PARA 113 et seq.

2 *Jabbour v State of Israel Absentee's Property Custodian* [1954] 2 All ER 145 at 150, [1954] 1 WLR 139 at 143 per Pearson J; *Re Collbran's Claim* [1956] Ch 250, [1956] 1 All ER 310 (claim under repairing covenant not in respect of 'German enemy debt' for purpose of statute).

3 See PARAS 815-818 post.

4 See PARA 808 post.

5 See PARA 807 post.

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Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/1. INTRODUCTION/804.  
'Measure of damage' or 'measure of damages' and remoteness.

#### **804. 'Measure of damage' or 'measure of damages' and remoteness.**

The 'measure of damage' or 'measure of damages' is concerned with the legal principles governing recoverability; the principle of remoteness of damage serves to confine the recoverability of damages<sup>1</sup>. Questions of quantum of damages are concerned only with the amount of damages to be awarded, and are therefore distinct from the measure of damages<sup>2</sup>.

1 As to the measure of damages in tort see PARA 851 et seq post; as to the measure of damages in contract see PARA 941 et seq post; as to the measure of damages in bailment see PARA 1088 et seq post; and as to the measure of damages in misrepresentation see PARAS 1109-1110 post. As to remoteness in tort see PARA 851 et seq post; and as to remoteness in contract see PARA 1015 et seq post.

2 See PARA 806 post.

### **UPDATE**

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Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/1. INTRODUCTION/805.  
Damage as an ingredient in the wrong suffered.

### **805. Damage as an ingredient in the wrong suffered.**

In those torts which have been developed from the action on the case, such as negligence<sup>1</sup> and nuisance<sup>2</sup>, proof of actual damage is an essential ingredient in the cause of action. Another example is slander (other than slander actionable per se)<sup>3</sup>. A breach of contract or the infringement of an absolute right is actionable per se, and no actual damage need be proved<sup>4</sup>; if none is, any damages will usually be nominal<sup>5</sup>.

1 See generally NEGLIGENCE.

2 See generally NUISANCE.

3 See LIBEL AND SLANDER vol 28 (Reissue) PARA 56 et seq.

4 It is said that in wrongs actionable per se the law implies damage: see *Ratcliffe v Evans* [1892] 2 QB 524 at 528, CA, per Bowen LJ.

5 As to nominal damages see PARA 813 post.

## **UPDATE**

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Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/1. INTRODUCTION/806.  
'Quantum of damage' and 'quantum of damages'.

**806. 'Quantum of damage' and 'quantum of damages'.**

'Quantum of damage' and 'quantum of damages' are both phrases in current use. They are used in more than one sense, the usual characteristic being that no question of legal recoverability is involved, but merely the assessment or calculation in terms of money of non-pecuniary damage (such as pain and suffering or injury to reputation) or pecuniary damage (such as loss of earnings)<sup>1</sup>. Quantum of damage or of damages is thus distinguished from 'measure of damage', which involves considerations of law<sup>2</sup>.

1 See PARA 809 post.

2 See PARA 804 ante.

**UPDATE**

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Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/1. INTRODUCTION/807.  
Damages distinguished from costs.

### **807. Damages distinguished from costs.**

'Costs' signifies the sum of money which the court orders one party to pay to another party in respect of the expense of litigation incurred. Except where specially provided by statute<sup>1</sup> or by rules of court<sup>2</sup>, the costs of proceedings are at the court's discretion<sup>3</sup>. They normally follow the event so that the successful party will, in the absence of factors justifying some special order<sup>4</sup>, be awarded his costs of suit to be agreed or taxed by the court<sup>5</sup>. On a taxation of costs on the standard basis there is allowed a reasonable amount in respect of all costs reasonably incurred<sup>6</sup>. Any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount are to be resolved in favour of the paying party<sup>7</sup>. In some cases, an order may be made for payment of costs on an indemnity basis<sup>8</sup>. In such a case, any doubts of the taxing officer are to be resolved in favour of the receiving party, rather than the paying party<sup>9</sup>. A similar regime applies in the county court<sup>10</sup>.

Where the court makes an order for costs without indicating the basis of taxation or an order that costs are to be taxed other than on the standard or indemnity basis, the costs are taxed on the standard basis<sup>11</sup>. Legal aid taxation is also on the standard basis<sup>12</sup>.

Costs are distinct from damages<sup>13</sup>. The award of costs beyond the costs of the suit, by way of penalty or additional damages<sup>14</sup>, or the award of costs on a more liberal scale by way of damages<sup>15</sup> is not permissible.

1 Eg by the Slander of Women Act 1891 s 1 proviso (plaintiff not to recover more costs than damages unless judge certifies that there was reasonable ground for bringing action: see LIBEL AND SLANDER vol 28 (Reissue) PARA 58).

2 See eg RSC Ord 62 rr 2(4), 6(2); and CIVIL PROCEDURE.

3 Supreme Court Act 1981 s 51(1) (substituted by the Courts and Legal Services Act 1990 s 4(1)); RSC Ord 62 r 3(3); CCR 1981 Ord 38 r 1.

4 RSC Ord 62 r 3(1). See *Donald Campbell & Co v Pollak* [1927] AC 732 at 811, HL, per Viscount Cave.

5 See RSC Ord 62 rr 3(2); and CIVIL PROCEDURE.

6 RSC Ord 62 r 12(1); and CIVIL PROCEDURE.

7 RSC Ord 62 r 12(1); and CIVIL PROCEDURE.

8 RSC Ord 62 r 12(2); *Re a Company (No 004081 of 1989)* [1995] 2 All ER 155; and CIVIL PROCEDURE.

9 RSC Ord 62 r 12(2); and CIVIL PROCEDURE.

10 See CCR Ord 38 r 19A which has the effect of applying the Rules of the High Court to the County Court, except where the County Court Rules provide otherwise.

11 RSC Ord 62 r 12(3); and CIVIL PROCEDURE.

12 See *Willis v Redbridge Health Authority* [1996] 3 All ER 114, [1996] 1 WLR 1228, CA. As to the proposed extension of conditional fees to all categories of cases except criminal and family cases, and the proposed phasing out of the availability of legal aid in cases where conditional fees are permitted, see the Lord Chancellor's Department consultation paper *Access to Justice with Conditional Fees* (1998) and [1998] NLJ 322, 358, 917.

13 Thus in a personal injuries case, the cost of medical treatment is part of the damages, but the cost of a medical examination for the purpose of litigation forms part of the costs.

Where there is confusion as to whether a particular item is of costs or of damages (as in the case of fees payable to expert witnesses), the matter should be resolved by considering whether or not the fees were incurred as a natural consequence of the defendant's breach: see *Peak Construction (Liverpool) Ltd v McKinney Foundation* 69 LGR 1, 1 Build LR 111; *Hutchinson v Harris* 10 BLR 19 at 39).

14 *Willmott v Barber* (1881) 17 ChD 772, CA; *Re Vernon & Co (Pulp Products) Ltd's Patent* [1976] RPC 625.

15 *Cockburn v Edwards* (1881) 18 ChD 449 at 459, CA, per Jessel MR; *Re Vernon & Co (Pulp Products) Ltd's Patent* [1976] RPC 625.

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### **807 Damages distinguished from costs**

TEXT AND NOTES--RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

NOTE 3--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/1. INTRODUCTION/808.  
'Liquidated' and 'unliquidated' damages and penalties.

### **808. 'Liquidated' and 'unliquidated' damages and penalties.**

The parties may agree by contract that a particular sum is payable on the default of one of them. If the agreement is not obnoxious as a 'penalty', such a sum constitutes 'liquidated damages' and is payable by the party in default<sup>1</sup>. The term is also applied to sums expressly made payable as liquidated damages under a statute. In every other case, where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary, the damages are 'unliquidated'.

<sup>1</sup> As to damages in contract see PARA 941 et seq post.

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'Pecuniary' and 'non-pecuniary' damage.

### **809. 'Pecuniary' and 'non-pecuniary' damage.**

'Pecuniary damage' or 'pecuniary loss' refer to any financial disadvantage, past or future, whether precisely calculable or not<sup>1</sup>. Thus past loss of earnings and an assessment of loss of future earnings, loss due to damage to a chattel, loss on breach of a contract for the sale of goods, and loss of profits constitute pecuniary damage.

'Non-pecuniary damage' is exemplified by pain and suffering<sup>2</sup>, damage to reputation<sup>3</sup> and interference with the enjoyment of property<sup>4</sup>, although, of course, in each case pecuniary damage may have been sustained as well.

1 See PARA 806 ante.

2 See PARA 883 post. As to personal injury generally see PARA 878 et seq post.

3 See LIBEL AND SLANDER.

4 See PARA 860 et seq post.

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Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/1. INTRODUCTION/810. 'Prospective damages'.

### **810. 'Prospective damages'.**

The term 'prospective damages' is applied to the damages which are awarded to a plaintiff, not as compensation for the ascertained loss which he has sustained at the time of trial, but in respect of future damage or loss which is recoverable in law. In the case of pecuniary loss it is usual to quantify separately the past and prospective loss<sup>1</sup>; in the case of general damages for pain and suffering and loss of amenity, one sum is given for past and future suffering<sup>2</sup>.

<sup>1</sup> An exception is provided by the assessment of damages under the Fatal Accidents Act 1976 where one sum is awarded: see *Jefford v Gee* [1970] 2 QB 130 at 148, [1970] 1 All ER 1202 at 1209, CA, per Lord Denning MR (decided under the previous fatal accidents legislation); and see NEGLIGENCE vol 78 (2010) PARAS 24 et seq, 84.

<sup>2</sup> See *Jefford v Gee* [1970] 2 QB 130 at 147, [1970] 1 All ER 1202 at 1208, CA, per Lord Denning MR. As to interest on past and prospective damages see PARAS 848-850 post.

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Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/1. INTRODUCTION/811.  
'Aggravated' and 'exemplary' damages.

### **811. 'Aggravated' and 'exemplary' damages.**

In certain circumstances the court may award more than the normal measure of damages, by taking into account the defendant's motives or conduct. Such damages may be (1) 'aggravated damages', which are compensatory in that they compensate the victim of a wrong for mental distress, or injury to feelings, in circumstances in which that injury has been caused or increased by the manner in which the defendant committed the wrong, or the defendant's conduct subsequent to the wrong<sup>1</sup>; or (2) 'exemplary damages', which are punitive and not intended to compensate the plaintiff for any loss, but rather to punish the defendant<sup>2</sup>.

<sup>1</sup> See PARA 1111 et seq post.

<sup>2</sup> See PARA 1115 et seq post. It has been recommended that legislation be enacted providing that aggravated damages may be awarded only to compensate a person for his or her mental distress rather than to punish the defendant for his or her conduct, and that, wherever possible, the label 'damages for mental distress' should be used in preference to 'aggravated damages': see *Aggravated, Exemplary and Restitutionary Damages* (Law Com no 247) (1997). It is further recommended that the term 'punitive damages' should be used in preference to 'exemplary damages', and that such damages should be awarded only where, in committing a wrong, or in conduct subsequent to the wrong, the defendant deliberately and outrageously disregarded the plaintiff's rights; and that such damages should be available in all actions in tort or in respect of equitable wrongs, but not for breach of contract or under an undertaking in damages.

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### **811 'Aggravated' and 'exemplary' damages**

NOTE 1--See *Al-Rawas v Pegasus Energy Ltd* [2008] EWHC 617 (QB), [2009] 1 All ER 346 (wrongful grant of search and seizure orders, obtained by intentional concealment of relevant matters from court, justified award of aggravated damages).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/1. INTRODUCTION/812. 'General', 'special' and 'consequential' damages.

### **812. 'General', 'special' and 'consequential' damages.**

A distinction is frequently drawn between the terms 'general' and 'special' damages, which terms have different meanings according to the context in which they are used. In the context of liability for loss (usually in contract), general damages are those which arise naturally and in the normal course of events, whereas special damages are those which do not arise naturally out of the defendant's breach and are recoverable only where they were not beyond the reasonable contemplation of the parties (for example, where the plaintiff communicated to the defendant prior to the breach the likely consequences of the breach)<sup>1</sup>. The distinction between the two terms is also drawn in relation to proof of loss: here, general damages are those losses, usually but not exclusively non-pecuniary<sup>2</sup>, which are not capable of precise quantification in monetary terms, whereas special damages, in this context, are those losses which can be calculated in financial terms<sup>3</sup>. A third distinction between the two terms is in relation to pleading: here, special damage refers to those losses which must be proved, whereas general damages are those which will be presumed to be the natural or probable consequence of the wrong complained of, with the result that the plaintiff is required only to assert that such damage has been suffered<sup>4</sup>. Finally, the expression 'special damage' may be used alone, not in conjunction with the term 'general damage'. Here it may refer to the particular damage which an individual member of the public must prove to succeed in a private action based on a public nuisance; or to the damage to reputation which must be proved in most actions in slander<sup>5</sup>.

Although general and special damages have been said to be part of one single sum<sup>6</sup>, the court's obligation, in awarding interest, to differentiate between past pecuniary loss, future pecuniary loss and non-pecuniary damage<sup>7</sup> now usually results in the award of three specific sums, with the corollary that each sum should be separately regarded on appeal<sup>8</sup>. Where a high figure has been awarded for loss of earning, it is not normally justifiable, in the light solely of this high figure, to reduce the amount awarded for non-pecuniary loss<sup>9</sup>. However, where awards have been made for both loss of earning and for a lifetime's cost of care, the plaintiff's savings in living expenses must be offset against the latter award<sup>10</sup>. Where the plaintiff is cared for by the National Health Service, and consequently no award is made in respect of nursing costs, the savings in living expenses must be offset against the award for loss of earnings<sup>11</sup>.

'Consequential' damage or loss usually refers to pecuniary loss consequent on physical damage, such as loss of profit sustained due to fire damage in a factory. It is most frequently encountered in contracts and insurance policies when its meaning is a matter of construction. When used in an exemption clause in a contract, 'consequential' refers to damage which is only recoverable under the second head in *Hadley v Baxendale*<sup>12</sup>, and does not preclude recovery of loss of profits under the first head in that case<sup>13</sup>.

1 The distinction between general and special damages in this context is expressed by the first and second heads in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 et seq post. See also *Monarch Steamship Co Ltd v Karlshamns Oljefabriker AB* [1949] AC 196 at 221, [1949] 1 All ER 1 at 12, HL; *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119, CA.

2 Examples of general damages for non-pecuniary loss in this context are damages awarded for pain and suffering in personal injury claims (as to which see PARA 883 post) and damages for harm to reputation in defamation actions (see LIBEL AND SLANDER); general damages for unquantifiable pecuniary loss may be recovered where the defendant's breach of contract causes unquantifiable harm to the plaintiff in his business: see *Rolin v Steward* (1854) 14 CB 595; *Wilson v United Counties Bank* [1920] AC 102, HL; *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119, CA.

3 In personal injury actions, claims for loss of earnings, whether past or future, constitute special damages, as do claims for the cost of nursing care and any other costs associated with the plaintiff's injury: see further PARA 886 et seq post.

4 *Ströms Bruks Aktie Bolag v Hutchison* [1905] AC 515, 74 LJPC 130, HL; *Admiralty Comrs v SS Susquehanna, The Susquehanna* [1926] AC 655 at 661, HL, per Lord Dunedin.

5 See generally LIBEL AND SLANDER.

6 See eg *Fletcher v Autocar and Transporters Ltd* [1968] 2 QB 322 at 336, [1968] 1 All ER 726 at 733-734, CA, per Lord Denning MR; *Cutler v Vauxhall Motors Ltd* [1971] 1 QB 418 at 426, [1970] 2 All ER 56 at 61, CA, per Edmund Davies LJ.

7 See *Jefford v Gee* [1970] 2 QB 130, [1970] 1 All ER 1202, CA. As to the award of interest see PARAS 848-850 post.

8 *Smith v Manchester City Council* (1974) 118 Sol Jo 597, CA.

9 See *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 at 192, [1979] 2 All ER 910 at 922, HL, per Lord Scarman.

10 *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, [1979] 2 All ER 910, HL.

11 See *Shearman v Folland* [1950] 2 KB 43, [1950] 1 All ER 976, CA; *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, [1979] 2 All ER 910, HL.

12 See note 1 supra.

13 *Saint Line Ltd v Richardsons, Westgarth & Co Ltd* [1940] 2 KB 99 at 104. In *Millar's Machinery Co Ltd v David Way & Son* (1935) 40 Com Cas 204 at 210, CA, per Maugham LJ, 'consequential' was defined as 'not direct'; but as to the present-day formulation of the measure of damages in tort and contract in terms of foreseeability rather than causation or directness see PARAS 851 et seq, 1015 et seq post. See also *Croudace Construction Ltd v Cawoods Concrete Products Ltd* [1978] 2 Lloyd's Rep 55, CA (loss arising directly and naturally from late delivery not consequential); and PARA 1021 note 4 post.

As to exclusion clauses in contracts see CONTRACT vol 9(1) (Reissue) PARA 797 et seq.

## UPDATE

### 801-814 Introduction

The provision of claims management services is regulated by the Compensation Act 2006 Pt 2 (ss 4-15): see LEGAL PROFESSIONS vol 65 (2008) PARA 553 et seq.

Neither the Secretary of State nor any of the designated judges (ie the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division or the Chancellor of the High Court) (see generally COURTS) are liable in damages for anything done or omitted in the discharge or purported discharge of any of their functions under the Courts and Legal Services Act 1990 Pt 2 (ss 17-70) (see generally LEGAL PROFESSIONS): ss 69(1), 119(1) (s 69(1) amended by SI 2003/1887; and prospectively repealed by Legal Services Act 2007 Sch 21 para 92, Sch 23; definition of 'designated judges' in Courts and Legal Services Act 1990 s 119(1) amended by Constitutional Reform Act 1990 Sch 4 para 216).

### 801-814 Introduction

The provision of claims management services is regulated by the Compensation Act 2006 Pt 2 (ss 4-15): see PARA 815A.



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'Nominal damages'.

### 813. 'Nominal damages'.

A plaintiff is entitled to 'nominal damages' where: (1) his rights have been infringed, but he has not in fact sustained any actual damage from the infringement<sup>1</sup>, or he fails to prove that he has<sup>2</sup>; or (2) although he has sustained actual damage, the damage arises not from the defendant's wrongful act<sup>3</sup> but from the conduct of the plaintiff himself<sup>4</sup>; or (3) the plaintiff is not concerned to raise the question of actual loss<sup>5</sup>, but brings his action simply with the view of establishing his right<sup>6</sup>. Such damages may be awarded in actions for breach of contract<sup>7</sup> or in respect of torts which are actionable per se<sup>8</sup>.

Nominal damages have been defined as a sum of money that may be spoken of but that has no existence in point of quantity, or a mere peg on which to hang costs<sup>9</sup>. In practice, however, a small sum of money is awarded, usually £5<sup>10</sup>. Nominal damages must be distinguished from small damages where the loss is small but quantifiable<sup>11</sup>, or contemptuous damages<sup>12</sup> which indicate the court's opinion that the action ought not to have been brought.

1 See eg *Taylor v Henniker* (1840) 12 Ad & El 488 at 492; *Clifton v Hooper* (1844) 6 QB 468; *West v Houghton* (1879) 4 CPD 197; *Northam v Hurley* (1853) 1 E & B 665; *Columbus Co v Clowes* [1903] 1 KB 244; *Ashdown v Ingamells* (1880) 5 ExD 280, CA. The remedy where the plaintiff has suffered no inconvenience is to deprive him of costs: *Marzetti v Williams* (1830) 1 B & Ad 415 at 425 per Parke J; *Hiort v London and North Western Rly Co* (1879) 4 ExD 188 at 196, CA, per Bramwell LJ; *Nicolas v Atkinson* (1909) 25 TLR 568.

2 *Twyman v Knowles* (1853) 13 CB 222; *Marzetti v Williams* (1830) 1 B & Ad 415; *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343, CA (disturbance of a several fishery). Actual damage may be inferred, however, as where, in a passing-off action, it was held that, as the defendants had issued deceptive literature, it was open to the court to infer that some people were deceived: *Plomien Fuel Economiser Co Ltd v National School of Salesmanship Ltd* (1943) 60 RPC 209, CA.

3 *Hiort v London and North Western Rly Co* (1879) 4 ExD 188, CA; *Sanders v Stuart* (1876) 1 CPD 326.

4 *Warre v Calvert* (1837) 7 Ad & El 143 at 154 per Lord Denman CJ; *Hamlin v Great Northern Rly Co* (1856) 1 H & N 408; *Weld-Blundell v Stephens* [1920] AC 956, HL (disclosure in breach of contract of plaintiff's libel on third parties). See further para 856 post.

5 1 Wms Saund (1871 Edn) 626-627; *Marzetti v Williams* (1830) 1 B & Ad 415 at 426 per Taunton J.

6 *Northam v Hurley* (1853) 1 E & B 665; *Medway Co v Earl of Romney* (1861) 9 CBNS 575; *Embrey v Owen* (1851) 6 Exch 353; *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343, CA (disturbance of a several fishery is invasion of a legal right).

7 *Surrey County Council v Bredero Homes* [1991] 3 All ER 705, [1993] 1 WLR 1361, CA; *Marzetti v Williams* (1830) 1 B & Ad 415.

8 *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864, [1982] 1 All ER 28, CA; *Constantine v Imperial Hotels Ltd* [1944] KB 693, sub nom *Constantine v Imperial London Hotels Ltd* [1944] 2 All ER 171.

9 *Beaumont v Greathead* (1846) 2 CB 494 at 499 per Maule J, where, however, the claim was for nominal damages for non-payment of a sum due, and the court held that when the sum due was paid or tendered this was equivalent to payment or tender of nominal damages also.

10 See eg *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864, [1982] 1 All ER 28, CA; *Berkowitz v MW (St John's Wood)* [1993] 48 EG 133, [1993] EGCS 115 (revsd [1995] 14 EG 138, [1994] EGCS 155, CA). Other sums awarded as nominal damages before the introduction of decimal currency are five guineas (*Constantine v Imperial Hotels Ltd* [1944] KB 693 at 708, sub nom *Constantine v Imperial London Hotels Ltd* [1944] 2 All ER 171 at 178); £1 (*James Jones & Sons Ltd v Earl of Tankerville* (1909) as reported in 25 TLR 714 at 716); a shilling (*Hiort v London and North Western Rly Co* (1879) 4 ExD 188, CA; *Warre v Calvert*

(1837) 7 Ad & El 413; *Sapwell v Bass* [1910] 2 KB 486 at 495; *Chaplin v Hicks* [1911] 2 KB 786 at 793, 801, CA; and see *Dicks v Brooks* (1880) 15 ChD 22 at 40-41, CA, per Bramwell LJ; *Twyman v Knowles* (1853) 13 CB 222; and a farthing (*Mostyn v Coles* (1862) 7 H & N 872), though the latter sum was generally reserved for contemptuous damages (as to which see the text and note 12 infra).

11 *The Mediana* [1900] AC 113 at 116, HL, per Lord Halsbury LC.

12 *Cooke v Brogden & Co* (1885) 1 TLR 497; *Kelly v Sherlock* (1866) LR 1 QB 686; *Red Man's Syndicate Ltd v Associated Newspapers Ltd* (1910) 26 TLR 394; *Gamble v Sales* (1920) 36 TLR 427.

## UPDATE

### 801-814 Introduction

The provision of claims management services is regulated by the Compensation Act 2006 Pt 2 (ss 4-15): see LEGAL PROFESSIONS vol 65 (2008) PARA 553 et seq.

Neither the Secretary of State nor any of the designated judges (ie the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division or the Chancellor of the High Court) (see generally COURTS) are liable in damages for anything done or omitted in the discharge or purported discharge of any of their functions under the Courts and Legal Services Act 1990 Pt 2 (ss 17-70) (see generally LEGAL PROFESSIONS): ss 69(1), 119(1) (s 69(1) amended by SI 2003/1887; and prospectively repealed by Legal Services Act 2007 Sch 21 para 92, Sch 23; definition of 'designated judges' in Courts and Legal Services Act 1990 s 119(1) amended by Constitutional Reform Act 1990 Sch 4 para 216).

### 801-814 Introduction

The provision of claims management services is regulated by the Compensation Act 2006 Pt 2 (ss 4-15): see PARA 815A.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/1. INTRODUCTION/814.  
Damages associated with a statute.

#### **814. Damages associated with a statute.**

The phrase 'statutory damages' is inexact and inelegant<sup>1</sup>. However, damages may be associated with statutes in various ways. Some statutes, for example the health and safety at work legislation<sup>2</sup>, impose a duty the breach of which will give rise to a civil action by an individual suffering damage<sup>3</sup>. The right has its origin in the statute, but the remedy is provided by the common law and a separate tort is created<sup>4</sup>. It will in all cases be necessary to determine whether the legislature intended that private law rights of action should be conferred in respect of breaches of the relevant statutory provision<sup>5</sup>.

A statute may create a civil action for damages directly<sup>6</sup>, and may define the criteria for the assessment of damages<sup>7</sup>. By statute, common law remedies may be excluded or limited<sup>8</sup>, or a limit put on the damages recoverable<sup>9</sup>. A statute may provide that additional damages will be payable, having regard to the flagrancy of the infringement and to any benefit accruing to the defendant by reason of the infringement<sup>10</sup>.

Compensation provided by a statute should be distinguished from damages<sup>11</sup>; so also should expenses made recoverable by statute<sup>12</sup>. In this connection the distinction is relevant where one statute confers a right to recover expenses, and another limits liability in damages<sup>13</sup>.

1 The term has now ceased to be in common usage.

2 See the Health and Safety at Work etc Act 1974 Pt I (ss 1-54) (as amended) and the system of regulations and approved codes of practice having effect under it. As to civil liability see s 47 (as amended); and HEALTH AND SAFETY AT WORK vol 52 (2009) PARA 416.

3 *Groves v Lord Wimborne* [1898] 2 QB 402, CA; and see HEALTH AND SAFETY AT WORK vol 52 (2009) PARA 416. Failure to perform the statutory duty to insure a motor vehicle may involve a civil duty to the person injured by the vehicle: see *Monk v Warbey* [1935] 1 KB 75, CA. However, if the statutory obligation to insure creates only a criminal liability in respect of failure so to insure, rather than making such failure unlawful per se, a civil duty will not be owed to a person who sustains loss as a result of that failure: *Richardson v Pitt-Stanley* [1995] QB 123, [1995] 1 All ER 460, CA (failure to insure contrary to Employers' Liability (Compulsory Insurance) Act 1969; see also generally INSURANCE). As to actions for breach of statutory duty see generally TORT.

4 *London Passenger Transport Board v Upson* [1949] AC 155 at 168, [1949] 1 All ER 60 at 67, HL, per Lord Wright.

5 See eg *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 2 KB 832, CA; *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58, sub nom *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733, HL, per Lord Jauncey. See generally *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, [1981] 2 All ER 456, HL; and STATUTES vol 44(1) (Reissue) PARA 1357; TORT.

6 See the Fatal Accidents Act 1976 s 1 (as substituted) (conferring a right of action in respect of a death caused by wrongful act); and NEGLIGENCE vol 78 (2010) PARAS 25-27. As to the survival of causes of action vested in a deceased person at his death, cf the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1) (as amended); and EXECUTORS AND ADMINISTRATORS.

7 See the Fatal Accidents Act 1976 ss 3, 4 (both substituted by the Administration of Justice Act 1982 s 3(1)); the Damages Act 1996 s 3(3), (4); and PARA 932 et seq post.

8 See eg the Civil Aviation Act 1982 s 76; and AIR LAW vol 2 (2008) PARAS 653-656.

9 Examples of liability which is excluded or limited are the liability of shipowners etc (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 628; SHIPPING AND MARITIME LAW vol 93 (2008) PARAS 195 et seq, 584, 590; and SHIPPING AND MARITIME LAW vol 94 (2008) PARAS 802, 1042 et seq), of carriers by air (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 154 et seq), of international carriers by rail (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 716 et seq) or road (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 669 et seq). For further cases of the statutory limiting of the right to

damages see eg the Copyright, Designs and Patents Act 1988 ss 96, 97; and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARAS 407, 419, 495, 533. As to the measure of damages where a bill of exchange is dishonoured see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1601-1602.

Under some statutes multiple damages are recoverable: eg under the Distress for Rent Act 1689 ss 3, 4 (both as amended) and the Distress for Rent Act 1737 s 18 (see DISTRESS vol 13 (2007 Reissue) PARA 987). Similarly, double the yearly value is payable for wilful holding over after expiry of a term, under the Landlord and Tenant Act 1730 s 1 (as amended): see *Cobb v Stokes* (1807) 8 East 358; *Robinson v Learoyd* (1840) 7 M & W 48; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 667 et seq.

10 See the Copyright, Designs and Patents Act 1988 s 97(2); and COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 419.

11 See PARA 815 text and note 1 post.

12 Statutory undertakers may have an absolute or qualified right to recover the cost of making good damage to their property: see eg the Water Industry Act 1991 s 176(3); and WATER AND WATERWAYS vol 100 (2009) PARA 442.

13 Cf *Stonedale No 1 (Owners) v Manchester Ship Canal Co, The Stonedale No 1* [1956] AC 1, [1955] 2 All ER 689, HL, where the right of a canal authority under a private Act to recover as a debt from shipowners the expenses of raising a ship was held not to constitute 'a liability to damages' on the part of the shipowners such as to enable them to limit their liability under the statutory provisions then in force. As to limitation of liability see now the Merchant Shipping Act 1995 ss 185, 186, Sch 7 (s 185 amended by the Merchant Shipping and Maritime Security Act 1997 s 15); and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1042 et seq. It seems, however, that the decision constitutes a general guide as to the distinction in meaning between expenses and damages, although the meaning of the expression is no doubt a matter of construction in each particular case.

## UPDATE

### 801-814 Introduction

The provision of claims management services is regulated by the Compensation Act 2006 Pt 2 (ss 4-15): see LEGAL PROFESSIONS vol 65 (2008) PARA 553 et seq.

Neither the Secretary of State nor any of the designated judges (ie the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division or the Chancellor of the High Court) (see generally COURTS) are liable in damages for anything done or omitted in the discharge or purported discharge of any of their functions under the Courts and Legal Services Act 1990 Pt 2 (ss 17-70) (see generally LEGAL PROFESSIONS): ss 69(1), 119(1) (s 69(1) amended by SI 2003/1887; and prospectively repealed by Legal Services Act 2007 Sch 21 para 92, Sch 23; definition of 'designated judges' in Courts and Legal Services Act 1990 s 119(1) amended by Constitutional Reform Act 1990 Sch 4 para 216).

### 814 Damages associated with a statute

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/2. COMPENSATION/815.  
Meaning of 'compensation'.

## 2. COMPENSATION

### 815. Meaning of 'compensation'.

In the sense in which the term is usually used, 'compensation' may be defined as the pecuniary recompense which a person is entitled to receive in respect of damage or loss which he has suffered, other than as a result of an actionable wrong, litigated in the civil court, committed by the person bound to make the recompense<sup>1</sup>. In this sense 'compensation' is distinct from 'damages', which are recoverable in respect of an actionable wrong. The two main classes of compensation consist of: (1) payments by public authorities in respect of land or other property lawfully acquired under statutory powers or injuriously affected by or under statutory provisions<sup>2</sup>; and (2) payments by government departments or statutory undertakers in respect of damage to property<sup>3</sup> or personal injuries<sup>4</sup>. However, there are many examples of compensation, both in relation to interests in land<sup>5</sup> and in other connections<sup>6</sup>, which fall outside these two classes<sup>7</sup>. There is now provision for the payment of compensation for miscarriages of justice<sup>8</sup>.

Although there is a general distinction between compensation as defined above and damages, there remains an uncertain borderline where, for example, the choice of the term to be used in a particular statutory provision may depend on the whim of the legislator with only slender criteria to guide him<sup>9</sup>.

The term 'compensation' is also sometimes used in senses which differ from that defined above and which do not involve a distinction between compensation and damages. In particular, 'compensation' is sometimes used to describe damages awarded by the courts as distinguished from payments for the support of a person injured which are made out of state or public funds<sup>10</sup>.

This section of the title deals with the general principles of compensation as defined above. Particular instances in which compensation is payable are dealt with in the appropriate titles elsewhere in this work<sup>11</sup>.

1 The general characteristic of 'compensation' in this sense is that in most circumstances the paying agency has acted lawfully, usually under statutory powers, or has not been concerned at all with the events giving rise to compensation; and the assessment of compensation is often referred to a tribunal and not to the courts, eg in the case of compensation relating to the compulsory acquisition of land (see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 715 et seq) or compensation for unfair dismissal (see EMPLOYMENT vol 40 (2009) PARA 769 et seq).

The sense in which 'compensation' is defined in the text, is in accordance with the view taken in *Dixon v Calcraft*[1892] 1 QB 458 at 463, CA, per Lord Esher MR, where a ship was detained by the Board of Trade, under statutory powers and with statutory provision for compensation, and where it was said that the expression 'compensation' was not ordinarily used as an equivalent for damages; it is used in relation to a lawful act which has caused injury: see the Merchant Shipping Act 1995 s 97; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1206. Contrast *Clark v Urquhart*[1930] AC 28, HL, a case concerned with liability to pay 'compensation' for misstatements in a prospectus under certain legislation in which the measure of 'compensation' was held to be the same as the measure of damages in an action for deceit. In this instance it seems that the word 'compensation' was inserted in the enactment because it avoided the invidious association of 'damages' with dishonesty: see *Clark v Urquhart* supra at 56.

2 As to compensation in relation to the acquisition of land under statutory powers and injurious affection see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 715 et seq. As to compensation for the compulsory hiring of land see AGRICULTURAL LAND vol 1 (2008) PARA 540. As to compensation for requisitioning etc under the

Compensation (Defence) Act 1939 see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 508 et seq; and as to compensation for temporary use of land for military manoeuvres etc see ARMED FORCES.

3 See eg the Land Compensation Act 1973 Pt 1 (ss 1-19) (as amended); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 883 et seq; the Electricity Act 1989 s 10(1), Sch 4 (as amended); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1287 et seq.

4 Eg payments by the Criminal Injuries Compensation Board: see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARA 2033 et seq.

5 As to compensation for planning restrictions see generally TOWN AND COUNTRY PLANNING. As to compensation in relation to the compulsory acquisition of rights over land for the construction of pipelines and to restrictions imposed for the protection of pipelines see the Pipe-lines Act 1962 ss 14, 58B (as added); and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARAS 561, 601. As to compensation which may be payable between a landlord and a tenant see generally AGRICULTURAL LAND vol 1 (2008) PARAS 310 et seq, 414 et seq; LANDLORD AND TENANT.

6 As to payments for the use of patented inventions in the service of the Crown see the Patents Act 1977 ss 55-59 (as amended); and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 404 et seq. As to compensation on non-renewal etc of a liquor licence see LICENSING AND GAMBLING. As to compensation for loss by riot see the Riot (Damages) Act 1886; and POLICE vol 36(1) (2007 Reissue) PARAS 173-177. As to the jurisdiction of a criminal court to order 'compensation' to be paid by a convicted person see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 375 et seq. As to compensation in respect of a period spent in prison before a successful appeal against conviction see *R v Secretary of State for the Home Office, ex p Chubb* [1986] Crim LR 809, DC.

Acts providing for the reorganisation of local government functions or the functions of other public bodies (eg on the privatisation of utilities) normally contain provisions as to the payment of compensation to officers or employees who suffer loss of employment or diminution of emoluments or pension rights by reason of the reorganisation: see eg the Local Government Act 1972 s 259 (as amended); and LOCAL GOVERNMENT vol 69 (2009) PARA 7.

7 See notes 2-6 supra.

8 See the Criminal Justice Act 1988 s 133, Sch 12 (as amended); and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 829; CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(4) (2006 Reissue) PARAS 2055-2056.

9 The Fatal Accidents Act 1846 (repealed) created a new cause of action in dependants of a deceased, and criteria for assessing 'damages' were laid down by s 2 (repealed). Here, the action depended on a civil wrong by the defendant. See now the Fatal Accidents Act 1976 s 3 (as substituted); and PARA 935 post. See also the Damages Act 1996 s 3(3), (4); and PARA 930 post. The Employment Rights Act 1996 s 94 gives an employee the right not to be 'unfairly' dismissed; the definitions of 'unfairness' in s 98 seem to have the hallmarks of a civil wrong. 'Compensation' may be awarded against an employer by an industrial tribunal in certain circumstances: see ss 118-127 which lay down detailed criteria of assessment; and see further EMPLOYMENT. 'Wrongful dismissal' at common law continues to be a civil wrong, but the criteria of assessment of damages for that wrong are irrelevant to compensation for unfair dismissal under the statutory provisions: *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1973] 1 WLR 45, NIRC.

A criminal court has power to order 'compensation' to be paid by a convicted person to a victim in respect of personal injury, loss or damage: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 375 et seq. As to the limitation of 'compensation' payable by carriers in certain circumstances see PARA 814 note 9 ante.

10 This particular usage has become common in discussions concerning the abolition or modification of the common law system of recompense in cases of personal injuries, currently being considered by the Royal Commission on Civil Liability and Compensation for Personal Injuries.

11 See the examples given in note 2 supra.

## UPDATE

### 815 Meaning of 'compensation'

TEXT AND NOTES--The provision of claims management services is regulated by the Compensation Act 2006 Pt 2 (ss 4-15): see LEGAL PROFESSIONS vol 65 (2008) PARA 553 et seq.

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6

(meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/2. COMPENSATION/816.  
Deprivation of rights by statute.

### **816. Deprivation of rights by statute.**

There is a well known principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms<sup>1</sup> or appears by irresistible inference from the statute read as a whole<sup>2</sup>. If there is reasonable doubt the subject should be given the benefit of the doubt<sup>3</sup>. Most statutes limiting private rights make provision for compensation, and may prescribe criteria<sup>4</sup>.

1 *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Comrs* [1927] AC 343 at 359, PC.

2 *Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508 at 529, [1970] 1 All ER 734 at 738, HL, per Lord Reid.

3 *Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508 at 529, [1970] 1 All ER 734 at 738, HL, per Lord Reid; cf *Minister of Housing and Local Government v Hartnell* [1965] AC 1134, [1965] 1 All ER 490, HL (distinguished in *Kingston-upon-Thames Royal London Borough Council v Secretary of State for the Environment* [1974] 1 All ER 193, [1973] 1 WLR 1549).

4 See eg as to compensation for compulsory acquisition and planning restrictions the titles cited in para 815 notes 2, 5 ante. For a case where on the construction of a particular statute the granting of a licence on conditions was held not to be a refusal of an application for a licence so as to qualify for compensation see *Limb & Co (Stevedores) v British Transport Docks Board* [1971] 1 All ER 828, [1971] 1 WLR 311 (a decision under the Docks and Harbours Act 1966 s 13 (repealed)).



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/2. COMPENSATION/817.  
Deprivation by the Crown of a subject's property.

**817. Deprivation by the Crown of a subject's property.**

Apart from statute, if the Crown deprives a British subject of property, whether within or outside the British Commonwealth and whether or not by virtue of the royal prerogative, the Crown must pay compensation<sup>1</sup>. Damage suffered in or for the necessities of battle when the country is at war constitutes an exception<sup>2</sup>, as does deprivation or destruction of property as part of a long term strategy<sup>3</sup>. Reliance on the prerogative is rare.

1 See *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, [1964] 2 All ER 348, HL.

2 See *Mulcahy v Ministry of Defence* [1996] QB 732, [1996] 2 All ER 758, CA (no order made reviving the effect of the Crown Proceedings Act 1947 s 10 (as amended) in respect of the Arabian Gulf at the time of the Gulf War, nevertheless under the common law there was no duty of care owed by one serviceman to another in battle conditions). See also CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 103.

3 See the War Damage Act 1965 s 1(1), altering for these purposes the law as laid down in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, [1964] 2 All ER 348, HL; and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 533.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/2. COMPENSATION/818.  
Measure of compensation.

### **818. Measure of compensation.**

The measure of compensation, both as to the application of the principles determining causation and as to the heads of loss to be taken into account, depends on the terms and construction of the relevant statute, but in the absence of any special terms or any particular construction it would seem that the principles applicable to the measure of damages apply<sup>1</sup>.

<sup>1</sup> See *Iron and Steel Holding and Realisation Agency v Compensation Appeal Tribunal* [1966] 1 All ER 769, [1966] 1 WLR 480, DC (compensation for loss of office on denationalisation of the steel industry), where the court applied common law principles to the statutory words 'in consequence of...', distinguishing constructions put on the same words in other statutes in other cases. As to the principles for ascertaining the measure of damages see PARA 804 ante.

For an example of heads of compensation being set out in the statute see the Employment Rights Act 1996 ss 118-125. See also *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1973] 1 WLR 45, NIRC; followed in *Addison v Babcock FATA Ltd* [1988] QBD 280, [1987] 2 All ER 784, CA.

It seems that, in general, compensation will, in the absence of any provision to the contrary, be assessed in the light of facts known at the date of assessment: see *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426, HL (distinguished in *Gaze v Holden* (1982) 266 EG 998, [1983] 1 EGLR 147, a case concerning the method of valuation to be used upon exercise of a land option, and in *Dhenin v Department of Transport* (1990) 60 P & CR 349, Lands Tribunal, a case concerning ascertainment of compensation under the Land Compensation Act 1973); *Simpson v Jones* [1968] 2 All ER 929 at 935, [1968] 1 WLR 1066 at 1075. As to the time of the valuation of land acquired under compulsory powers see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 635.

## **UPDATE**

### **818 Measure of compensation**

NOTE 1--*Bwllfa*, cited, applied in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12, [2007] 3 All ER 1 (war clause in time charterparty; war occurring after repudiatory breach by charterer; compensation reduced to reflect fact that charterer would have been entitled to terminate charterparty early); and *McKinnon v e.surv Ltd (formerly known as GA Valuation & Survey Ltd)* [2003] EWHC 475 (Ch), [2003] 20 EG 149.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(1) CONTRACT AND TORT COMPARED/819. Points of resemblance.

### 3. PRINCIPLES COMMON TO CONTRACT AND TORT

#### (1) CONTRACT AND TORT COMPARED

##### 819. Points of resemblance.

Certain aspects of the law of damages are common to both contract and tort<sup>1</sup>. Both in contract and in tort<sup>2</sup> the principal function of damages is compensatory<sup>3</sup>. Damages are ordinarily<sup>4</sup> assessed according to the claimant's actual loss<sup>5</sup>, though the mode of assessment may differ between causes of action<sup>6</sup>. The principles which govern liability for the loss of a valuable opportunity<sup>7</sup> are essentially the same whether the action is brought in contract or tort<sup>8</sup>. In contract as in tort, the claimant normally bears the burden of proving that the loss was suffered by him<sup>9</sup>, and was sufficiently predictable by the party in breach to satisfy the applicable rules of remoteness<sup>10</sup>, and was caused by the relevant breach of duty<sup>11</sup>. The same test of causation governs both contract and tort<sup>12</sup>. Damages are normally assessed according to the date of the wrong<sup>13</sup>, irrespective of its nature<sup>14</sup>, but in each case another date may be taken where this is necessary to do justice<sup>15</sup>. Deductions for betterment<sup>16</sup> are governed by the same principles whether the action lies in contract or tort<sup>17</sup>. In contract as in tort, damages for the repair or reinstatement of damaged or substandard property will be declined if the sum in question is disproportionate to the benefit which would be gained by its expenditure. An obligee's right to substantial damages from a party in breach<sup>18</sup>, which right obtains regardless of whether the obligee or some third party is the true bearer of the loss, is common to contract and tort<sup>19</sup>. The duty to mitigate is similar in both causes of action<sup>20</sup>. The burden of proving contributory fault rests in each case on the party in breach<sup>21</sup>, and the right of the party in breach to contribution from third parties is substantially unchanged whether he is sued in contract or in tort<sup>22</sup>. The court's statutory power<sup>23</sup> to award damages in addition to, or in substitution for, an injunction applies whether the cause of action is in contract or in tort<sup>24</sup>.

1 As to the availability of concurrent actions in contract and tort see *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 185-186, [1994] 3 All ER 506 at 525, HL, per Lord Goff, where it is recognised that different rules as to remoteness of damage govern contract and tort. See also Coote 'Contract Damages; Ruxley and the Performance Interest' [1997] CLJ 537 at 545; cf *Burrows Remedies for Torts and Breach of Contract* (2nd Edn, 1994) p 16.

2 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 841, [1976] 3 All ER 129 at 132, HL, per Lord Diplock; *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, HL; and see *Haines v Bendall* (1991) 172 CLR 60 at 63, Aust HC; *Gardiner v Metcalf* [1994] 2 NZLR 8 at 12, NZ CA. Damages in conversion are not to be inflicted in poenam (by way of penalty) and their function, as with damages generally, is compensatory: *BBMB Finance (Hong Kong) Ltd v Eda Holdings Ltd* [1991] 2 All ER 129 at 132, [1990] 1 WLR 409 at 413, PC. Thus where copper was wrongfully detained by carriers over a period during which the owners could not show that they would have used it, and the copper was returned undamaged to the claimants before they needed it, nominal damages were awarded for the temporary deprivation: *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864, [1982] 1 All ER 28, CA. Similarly, where a seller converted goods which he had sold on credit to the buyer, and in which property had passed to the buyer, the buyer was held entitled to the value of the goods converted minus the price that he would have had to pay to get delivery of them: *Chinery v Viall* (1860) 5 H & N 288. See also *Butler v The Egg & Egg Pulp Marketing Board* (1966) 114 CLR 185, Aust HC. The date by reference to which damages in conversion are to be assessed is that which most effectively compensates the plaintiff and achieves justice between the parties: *IBL Ltd v Coussens* [1991] 2 All ER 133, CA. As to damages in conversion generally see PARA 861 post; and TORT. As to the date on which damages for breach of contract are to be assessed see PARA 950 et seq post.

3 'The general rule in English law today as to the measure of damages recoverable for the invasion of a legal right, whether by breach of a contract or by commission of a tort, is that damages are compensatory. Their

function is to put the person whose right has been invaded in the same position as if it had been respected so far as the award of a sum of money can do so': *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774 at 841, [1976] 3 All ER 129 at 132, HL, per Lord Diplock. See also *Livingstone v Rawyards Coal Co*(1880) 5 App Cas 25 at 35, HL, per Lord Blackburn (a case of trespass to goods where the tortious measure of damages were described as: 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'); *The Argentino* (1888) 13 PD 191 at 196, CA, per Lord Esher, and at 200-201 per Bowen LJ (affd (1889) 14 App Cas 519, HL); *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*[1952] 2 QB 246 at 253, [1952] 1 All ER 796 at 800, CA, per Denning LJ; *Phillips v London and South West Rly Co* (1879) 5 QPD 78 at 87, CA, per James LJ; *Mediana (Owners) v Comet (Owners etc)*, *The Mediana*[1900] AC 113 at 119, HL, per Lord Halsbury LC, explaining *The City of Peking*(1890) 15 App Cas 438, PC; *British Transport Commission v Gourley*[1956] AC 185 at 197, [1955] 3 All ER 796 at 799, HL, per Earl Jowitt; and see *Banco de Portugal v Waterlow & Sons Ltd*[1932] AC 452 at 474, HL, per Viscount Sankey; *Monarch Steamship Co Ltd v Karlshamns Oljefabriker A/B*[1949] AC 196 at 221, [1949] 1 All ER 1 at 12, HL, per Lord Wright; and *Haines v Bendall* (1991) 172 CLR 60 at 63, Aust HC; *Gardiner v Metcalf* [1994] 2 NZLR 8 at 12, NZCA.

The general rule that damages are compensatory applies generally to actions against bailees, whether issued in contract, tort or breach of bailment. In the context of bailment, however, the common law exceptions to the compensatory principle are more extensive, though in some cases reversed or modified by statute. Moreover, there is authority that an action in bailment, being sui generis, can command a special right to damages distinct from that available in contract or tort; and that bailees can be made to account for the fruits of their wrongdoing. See generally paras 1088-1108 post.

4 But 'English law frequently gives [the plaintiff] less than his real loss': *Slater v Hoyle & Smith Ltd*[1920] 2 KB 11 at 24, CA, per Scrutton LJ.

5 The definition of loss may itself be controversial. The generalisation in the text is subject to the normal doctrines which limit the damages recoverable, such as remoteness, causation, mitigation and contributory negligence: see PARAS 851 et seq, 1015 et seq post; *Slater v Hoyle & Smith Ltd*[1920] 2 KB 11 at 20-21, 24-25, CA, per Scrutton LJ. For exceptional cases where a claimant in contract may recover more than his actual loss by way of restitution for unjust enrichment see RESTITUTION. For cases which exclude from consideration, in assessing the buyer's damages against a defaulting seller for breach of warranty or non-delivery, onward contracts which the buyer has made for the resale of the goods see PARA 969 et seq post.

6 Expectation interest is conventionally compensated in contract but only very rarely compensated in tort. In tort, the general aim of an award of damages is to return the plaintiff to the position he was in before the tort was committed; such damages are retrospective in that they seek to redress the wrong by reversing it: see *Livingstone v Rawyards Coal Co*(1880) 5 App Cas 25 at 35, HL, per Lord Blackburn. The scope of the duty owed by a valuer of property towards a lender who has commissioned the valuation is the same in contract as in tort; that, however, is primarily a question of the type of loss in respect of which the duty was owed, rather than the measure of the lender's recoverable loss: *South Australia Asset Management Corp v York Montague Ltd*[1997] 1 AC 191 at 211-212, [1996] 3 All ER 365 at 370, HL, per Lord Hoffmann.

7 See eg paras 887 et seq, 962 et seq post.

8 *Poseidon Ltd v Adelaide Petroleum NL* (1994) 179 CLR 332, Aust HC; *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 459, (1997) Times, 17 January, CA, per Staughton LJ (patent); *McFarlane v Wilkinson* [1997] 2 Lloyd's Rep 259, (1997) Times, 13 February, CA (barrister); *Ministry of Defence v O'Hare (No 2)* [1997] ICR 306, EAT (sex discrimination); *Doyle v Wallace*(1988) Times, 22 July, CA (personal injury).

9 Cf *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377; *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*[1952] 2 QB 246 at 256, [1952] 1 All ER 796 at 802, CA, per Romer LJ; and see *Armory v Delamirie* (1721) 1 Str 504.

10 See PARAS 851 et seq, 1015 et seq post.

11 The position is otherwise in bailment, where fault is presumed from harm but the bailee may escape by showing that failure on his part to take the necessary care did not cause or contribute to the loss: *Travers & Sons Ltd v Cooper*[1915] 1 KB 73, CA; and see BAILMENT vol 3(1) (2005 Reissue) PARAS 40, 43. The burden of proving that the duty exists rests normally on the claimant. In contract and tort, the burden of proving that the duty has been broken also rests normally on the claimant; but in an action against a bailee for want of proper care this is reversed, and once harm is shown, the bailee must positively prove that he took reasonable care in the safekeeping of the object: *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd*[1979] AC 580, [1978] 3 All ER 337, PC.

12 *Beoco Ltd v Alfa Laval Co Ltd*[1995] QB 137, [1994] 4 All ER 464, CA; and see PARAS 854 et seq, 1035 et seq post.

13     le breach of contract, or breach of duty in tort, as the case may be.

14     *Miliangos v George Frank (Textiles) Ltd*[1976] AC 443 at 468, [1975] 3 All ER 801 at 813, HL, per Lord Wilberforce (damages in foreign currency: see PARAS 1132-1144 post); *Dodd Properties (Kent) Ltd v Canterbury City Council*[1980] 1 All ER 928 at 933, [1980] 1 WLR 433 at 450-451, CA, per Megaw LJ; *Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246 at 252-253, CA, per Taylor LJ.

15     See eg *Johnson v Agnew*[1980] AC 367, [1979] 1 All ER 883, HL (contract for sale of land); *IBL Ltd v Coussens*[1991] 2 All ER 133, CA (tort of conversion).

16     As to deductions for betterment see PARAS 862, 983 post.

17     *Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246 at 249-250, (1989) 139 NLJ 364 at 364-365, CA, per Taylor LJ.

18     Because that payment or suffering is merely *res inter alios acta*.

19     *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*[1994] 1 AC 85 at 97, [1993] 3 All ER 417 at 422, HL, per Lord Griffiths (contract); relying on *Jones v Stroud District Council*[1988] 1 All ER 5, [1986] 1 WLR 1151, CA (tort). Cf *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) Times, 11 February, CA, which grounds the right to substantial damages on agreement, intention or contemplation, an analysis which is difficult to reconcile with tort claims where the parties have no prior communication or agreement.

20     See PARAS 859, 1041 et seq post.

21     *Joseph Constantine Steamship Ltd v Imperial Smelting Corp Ltd*[1942] AC 154, HL; and see PARAS 876, 1047 et seq post.

22     See the Civil Liability (Contribution) Act 1978; and PARA 837 et seq post.

23     le under the Supreme Court Act 1981 s 50: see PARA 1121 et seq post.

24     *Jaggard v Sawyer*[1995] 2 All ER 189 at 205, [1995] 1 WLR 269 at 285, CA, per Millett LJ. The statutory power also enables damages to be awarded in addition to, or in substitution for, a decree of specific performance (as well as an injunction), but a decree of specific performance is not appropriate in a tort claim. As to specific performance see generally SPECIFIC PERFORMANCE.

## UPDATE

### 819 Points of resemblance

NOTE 5--If an innocent claimant's impecuniosity means that he has to avail himself of the services of a credit hire company, so that the expense he incurs in procuring a substitute vehicle is greater than ordinary car hire, those costs are still recoverable by the claimant from the defendant: *Lagden v O'Connor*[2003] UKHL 64, [2004] 2 All ER 277.

NOTE 19--*Alfred McAlpine*, cited, reversed: [2000] 4 All ER 97, HL (exception to general rule may be justified, but only where necessary to avoid absence of a remedy).

NOTE 23--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(1) CONTRACT AND TORT COMPARED/820. Doubtful or partial parallels.

## 820. Doubtful or partial parallels.

Damages in contract are only exceptionally awarded to compensate for distress, vexation or loss of enjoyment unrelated to physical inconvenience<sup>1</sup>. It is uncertain whether the basis on which damages for distress or mental suffering are awarded in tort<sup>2</sup> conforms to that in contract<sup>3</sup>. Whereas damages in contract are normally awarded to compensate for loss of the innocent party's expectation interest<sup>4</sup>, enabling recovery for the gains he would have derived from performance<sup>5</sup>, damages in tort do not normally<sup>6</sup> compensate for expectation losses<sup>7</sup>, but seek to restore the claimant to the position which he occupied before the tort occurred<sup>8</sup>. A claim in contract does not attract the defence of contributory negligence<sup>9</sup> unless the defendant breaks a contractual duty of reasonable care in a manner which is independently actionable in tort<sup>10</sup>.

1 *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 1421, CA; *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL.

2 See PARA 883 post.

3 See Palmer and Hudson *Damages for Distress and Loss of Enjoyment in Claims involving Chattels* in Palmer & McKendrick *Interests in Goods* (2nd Edn, 1998) p 876 note 69; and PARA 957 et seq post.

4 See PARA 977 et seq post.

5 *Robinson v Harman* (1848) 1 Exch 850 at 855 per Parke B.

6 Cf *White v Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL (action by disappointed beneficiary against negligent solicitor); *East v Maurer* [1991] 2 All ER 733, [1991] 1 WLR 461, CA (misrepresentation).

7 But cf *White v Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL (solicitor liable in negligence for proposed beneficiary's failure to inherit under will).

8 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39, HL, per Lord Blackburn.

9 See generally the Law Reform (Contributory Negligence) Act 1945; paras 876 (tort), 1047 et seq (contract) post; and NEGLIGENCE vol 78 (2010) PARAS 75-82.

10 See *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, [1988] 2 All ER 43, CA (affd [1989] AC 852, [1989] 1 All ER 402, HL); *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214, [1995] 1 All ER 289, CA. Liability in tort for negligence is always subject to the defence of contributory negligence, though the defence does not generally apply to deliberate torts, eg in an action for deceit: *Alliance and Leicester Building Society v Edgestop* [1994] 2 All ER 38, [1993] 1 WLR 1462.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(1) CONTRACT AND TORT COMPARED/821. Points of distinction.

### 821. Points of distinction.

Punitive damages can be awarded in tort but not in contract<sup>1</sup>. Where damages are in principle awardable in contract or tort, the standard of predictability of loss is normally more exacting in contract than in tort<sup>2</sup>. A claimant in contract must (broadly) show that the loss flowed naturally and probably from the breach, or was within the contract breaker's reasonable contemplation as a serious possible consequence of the breach<sup>3</sup>. A claimant in tort need (broadly) show only that the loss was reasonably foreseeable by the party in breach<sup>4</sup>. In practical terms, the contractual standard may require the claimant to give the other party, at the time of formation of the contract, specific information about the type of loss the claimant is likely to suffer if the contract is broken<sup>5</sup>. The ability to give that information, and thus to enable the other party to make suitable provision, is thought to justify the distinction between contract and tort in this respect.

1 See PARA 949 post. An award of punitive (or exemplary) damages is exceptional even where theoretically open to the court.

2 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 185-86, [1994] 3 All ER 506 at 525, HL, per Lord Goff of Chieveley. Rules as to remoteness of damage are less restricted in tort than they are in contract: see *Henderson v Merrett Syndicates Ltd* supra at 190-191 and 529-530).

3 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686, HL; *Hadley v Baxendale* (1854) 9 Exch 341.

4 See *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd, The Wagon Mound* [1961] AC 388, [1961] 1 All ER 404, PC (negligence); *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, [1994] 1 All ER 53, HL (the rule in *Rylands v Fletcher* (1868) LR 3 HL 330); and see PARA 851 et seq post. In *H Parsons (Livestock) v Uttley Ingham & Co* [1978] QB 791, [1978] 1 All ER 525, CA, Lord Denning MR held that the applicable rule of remoteness was dictated by the type of loss or injury suffered and not by the particular cause of action; for loss of profits, the test was one of reasonable contemplation as a serious possibility or real danger (relying on *Hadley v Baxendale* (1854) 9 Exch 341; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686, HL, the conventional test in contract), while for physical damage the test should be one of reasonable foresight as a possible consequence (relying on *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd, The Wagon Mound* supra, the conventional test in tort). In each case, the rule indicated by the above division should govern irrespective of whether the action is brought in contract or in tort. In *H Parsons (Livestock) v Uttley Ingham & Co* supra at 806-807 and 535-537 per Scarman LJ, it was held that the authorities did not support Lord Denning MR's analysis. Indeed, later decisions have not pursued Lord Denning MR's division in *H Parsons (Livestock) v Uttley Ingham & Co* supra. Cf *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 185-86, 190-191, [1994] 3 All ER 506 at 525, 529-530, HL, per Lord Goff of Chieveley.

5 See *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA; cf *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at 142, [1966] 1 WLR 1428 at 1447, CA, per Diplock LJ; *H Parsons (Livestock) v Uttley Ingham & Co* [1978] QB 791, [1978] 1 All ER 525, CA.

## UPDATE

### 821 Points of distinction

NOTE 3--See *Berryman v Hounslow LBC* (1996) 30 HLR 567, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(1) CONTRACT AND TORT COMPARED/822. Policy.

## 822. Policy.

Considerations of policy may inform the assessment of damages in both contract and tort, though their impact is seldom directly acknowledged<sup>1</sup>. Policy concerns may be evident both in novel situations and in cases where the applicable measure is established<sup>2</sup>. The rule that (aside from physical inconvenience) only contracts which are for the provision of pleasure or the alleviation of stress can found damages for mental suffering is a policy constraint, which operates independently of the rules on remoteness<sup>3</sup>. The principle that the measure of damages awarded in contract must be reasonable and proportionate to the benefit gained from its exaction can be attributed in part to a desire to discourage economic waste<sup>4</sup>. Indeed, that concern may be reflected in the more general rule that damages in contract and tort are compensatory<sup>5</sup>. Similar concerns may underlie the denial of recovery for loss which a claimant could reasonably have prevented or abated<sup>6</sup>, the rule against penalties<sup>7</sup>, and also the tendency to treat consensual measurements of loss as agreed damages clauses, rather than penalty clauses, in contracts between parties of similar bargaining strength<sup>8</sup>. Policy may also justify that aspect of the rule of remoteness in contract which requires communication to the party in breach of special or unusual factors likely to affect the loss suffered on breach<sup>9</sup>. The presumption of maximum value against a wrongdoer through whose fault a precise assessment of the claimant's loss is impossible<sup>10</sup> may owe something to a general policy concern that wrongdoers should not profit from their wrongs<sup>11</sup>. The exceptional measure of damages for fraud, which subjects the fraudulent party to the entire risk of a loss the defrauded party would not have suffered had he not been induced by the fraud<sup>12</sup>, has been justified both on the ground that it affords a deterrent against fraud, and on the ground that damages for fraud are frequently a restitutionary remedy<sup>13</sup>. Further exceptional departures from the normal rule that a party in breach of duty is liable only for the type of loss in respect of which his duty was owed, or for those results which are attributable to that which made his act wrongful, must similarly be justified on some special policy ground<sup>14</sup>. In tort, considerations of policy may qualify the normal principle of 'but for' causation<sup>15</sup>. In personal injury actions, policy precludes a plaintiff in negligence from recovering damages for the cost of care from a tortfeasor who has gratuitously and voluntarily supplied that care<sup>16</sup>. Considerations of policy also affect the recovery of damages for the birth of a child following a negligently performed sterilisation of either parent<sup>17</sup>.

1 For a rare (albeit oblique) acknowledgement see *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 452, (1997) Times, 17 January, CA, per Staughton LJ. Policy is more commonly invoked in the discovery or denial of original duties than in the measurement of damages for breaches of established duties. This is particularly so in regard to actions in tort for economic loss: *Hedley Byrne & Co v Heller & Partners* [1964] AC 465, [1963] 2 All ER 575, HL; *Junior Books v Veitchi Co* [1983] 1 AC 520, [1982] 3 All ER 201, HL; *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL; *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, HL; *White v Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL; *Spring v Guardian Assurance plc* [1995] 2 AC 296, [1994] 3 All ER 129, HL; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, [1994] 3 All ER 506, HL. However, duty and remoteness can often merge into one another, particularly with actions in tort for negligence: see *Spartan Steel and Alloys v Martin & Co (Contractors) Ltd* [1973] QB 27 at 36, [1972] 3 All ER 557 at 561-562, CA, per Lord Denning MR. A similar blurring can occur between remoteness (foreseeability) and causation: *Gerber Garment Technology Inc v Lectra Systems Ltd* supra at 452 per Staughton LJ.

2 See eg *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 215, [1996] 3 All ER 365 at 373-374, HL, per Lord Hoffmann (fraud; liability of valuer for breach of contractual and tortious duty of care).

3 *Watts v Morrow* [1991] 4 All ER 937 at 959-960, [1991] 1 WLR 1421 at 1445, CA, per Bingham LJ.



4 *Ruxley Electronics and Construction v Forsyth* [1996] AC 344 at 367-368, [1995] 3 All ER 268 at 283-284, HL, per Lord Lloyd of Berwick (semble) citing *Bellgrove v Eldridge* (1954) 90 CLR 613, Aust HC. A similar policy inhibits the award of a decree of specific performance (in preference to damages) where the cost to the defendant of complying with such a decree is excessive and disproportionate in comparison to the loss occasioned to the plaintiff by the breach: see *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, [1997] 3 All ER 297, HL. See also *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA (misrepresentation; damages in lieu of rescission).

5 Cf *A-G v Blake* [1998] 1 All ER 833, CA; *Ruxley Electronics and Construction v Forsyth* [1996] AC 344 at 361-362, [1995] 3 All ER 268 at 278-279, HL, per Lord Lloyd of Berwick.

6 See PARAS 859, 1041 et seq post.

7 See eg para 1065 post.

8 As to consensual adjustment of damages see PARA 1065 et seq post.

9 See *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128, [1966] 1 WLR 1428, CA.

10 *Armory v Delamirie* (1721) 1 Stra 505. See also *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, Aust HC; *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 257, [1952] 1 All ER 796 at 802, CA, per Romer LJ.

11 The rule is one of construction and not of law: *Alghussein Establishment v Eton College* [1991] 1 All ER 267, [1988] 1 WLR 587, HL.

12 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 215-216, [1996] 3 All ER 365 at 374, HL, per Lord Hoffmann; and see *Smith New Court (Securities) Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, [1996] 4 All ER 769, HL.

13 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 215-216, [1996] 3 All ER 365 at 374, HL, per Lord Hoffmann. See further *Smith New Court (Securities) Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 at 279-280, [1996] 4 All ER 769 at 790, HL, per Lord Steyn (deterrence of fraud and promotion of general moral considerations).

14 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 215, [1996] 3 All ER 365 at 373, HL, per Lord Hoffmann.

15 *Wright v Lodge, Kerek v Lodge* [1993] 4 All ER 299, [1993] RTR 123, CA.

16 See PARA 898 post.

17 See *Udale v Bloomsbury Area Health Authority* [1983] 2 All ER 522, [1983] 1 WLR 1098; *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651; cf *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012, [1984] 3 All ER 1044, CA; *McFarlane v Tayside Health Board* 1998 SLT 307.

## UPDATE

### 822 Policy

NOTE 5--*A-G v Blake*, cited, reversed in part: [2000] 4 All ER 385, [2000] 3 WLR 625, HL. See also *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones (a firm)* [2006] EWHC 2017 (Ch), [2006] All ER (D) 461 (Jul).

NOTE 17--*McFarlane*, cited, reversed: [1999] 4 All ER 961, HL. Where medical negligence results in the birth of a healthy but unwanted child, economic loss is not recoverable: *Greenfield v Flather* [2001] EWCA Civ 113, [2001] Lloyd's Rep Med 143, applying *McFarlane*, cited. A disabled parent cannot obtain damages for the general costs of bringing up her unwanted healthy child: *AD v East Kent Community NHS Trust* [2002] EWCA Civ 1872, [2003] 2 FCR 704.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(1) CONTRACT AND TORT COMPARED/823. Damages and other matters.

### **823. Damages and other matters.**

Questions which appear at first sight to involve the measurement of recoverable loss may on examination disclose questions as to the scope of duty<sup>1</sup> or causation<sup>2</sup>. The factors which impinge on liability often intermesh and become interchangeable; this is particularly so where those doctrines which limit the recoverable damages (such as remoteness, causation, mitigation and contributory negligence) are at issue<sup>3</sup>. Some claims can be resolved either by reference to existence and scope of duty, or in the alternative by reference to remoteness of damage, without significant difference in the result<sup>4</sup>. In other cases, however, the identification of the type of loss for which the claimant is entitled to compensation is a crucial prerequisite to the calculation of the damages awardable<sup>5</sup>.

1 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365, HL (liability of valuer of property to lender). Cf *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 452-453, (1997) Times, 17 January, CA, per Staughton LJ (patent).

2 See eg *Allied Maples Group v Simmons & Simmons (a firm)* [1995] 4 All ER 907, [1995] 1 WLR 1602, CA (damages for loss of chance).

3 See PARAS 851 et seq, 1015 et seq post; and see *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 452, (1997) Times, 17 January, CA, per Staughton LJ.

4 *Spartan Steel and Alloys v Martin & Co* [1973] QB 27 at 37, [1972] 3 All ER 557 at 562, CA, per Lord Denning MR. See further *Lamb v Camden London Borough Council* [1981] QB 625, [1981] 2 All ER 408, CA.

5 *Banque Bruxelles SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 213-216, HL, per Lord Hoffmann; *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 452-453, (1997) Times, 17 January, CA, per Staughton LJ.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(1) CONTRACT AND TORT COMPARED/824. Effect of statute.

## **824. Effect of statute.**

Both in contract and in tort the measurement of damages may be affected by statute<sup>1</sup>. Statute governs certain actions<sup>2</sup> for non-fraudulent<sup>3</sup> misrepresentation<sup>4</sup>, actions founded on contracts for the sale of land<sup>5</sup>, actions under domestic and international contracts of carriage<sup>6</sup>, and certain aspects of actions in tort for personal injury<sup>7</sup>. On some occasions, statute may prescribe principles of assessment which reflect and are ultimately subject to the common law<sup>8</sup>. On other occasions, as with contributory negligence<sup>9</sup> and contribution<sup>10</sup>, statute may affect an award of damages which is otherwise governed by common law principle. Statute may also dictate the effect of an award of damages on property which is the subject of the action<sup>11</sup>. Damages in equity are a special case, examined elsewhere in this title<sup>12</sup>.

1 Actions in bailment may also be affected by statute: see generally para 1088 et seq post.

2 As to liability in tort for negligent misstatement, arising independently of statute see PARA 875 post; and NEGLIGENCE vol 78 (2010) PARA 14.

3 As to fraud see generally MISREPRESENTATION AND FRAUD.

4 See the Misrepresentation Act 1967 s 2(1), (2); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 801, 811, 834.

5 See PARA 1059 post; and SALE OF LAND.

6 See PARA 1055 post; and CARRIAGE AND CARRIERS vol 7 (2008) PARAS 773, 782

7 See PARA 878 et seq post.

8 As in the case of sale of goods: see the Sale of Goods Act 1979 ss 50-53 (as amended); *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA; para 1056 post; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 294, 309-310.

9 See PARA 1047 et seq (breach of contract), 876 (tort) post.

10 See PARA 837 et seq post.

11 See eg the Torts (Interference with Goods) Act 1977 s 5 (extinction of title on satisfaction of claim for damages); and TORT.

12 See PARA 1120 et seq post; and see generally EQUITY.

## **UPDATE**

### **824 Effect of statute**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(1) CONTRACT AND TORT COMPARED/825. Damages and equitable remedies.

## 825. Damages and equitable remedies.

Where compensation by way of damages would be an inadequate remedy<sup>1</sup> or is not possible<sup>2</sup>, equity may grant relief<sup>3</sup> by ordering either an injunction<sup>4</sup> or specific performance of a contract<sup>5</sup>. Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance<sup>6</sup>, it may award damages either in addition to, or in substitution for, an injunction or specific performance<sup>7</sup>. This power extends to any case where the court has the jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement<sup>8</sup>. The measure of damages awarded by virtue of this provision normally corresponds with that awardable at common law, but may in fact differ<sup>9</sup>.

1 See generally EQUITY; SPECIFIC PERFORMANCE. For a modern application see *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, [1997] 3 All ER 297, HL. The inadequacy of damages may be shown where chattels are unique or otherwise special to the innocent party, in which event the court may order specific delivery of them to their owner or other claimant, rather than damages: see *Pusey v Pusey* (1684) 1 Vern 273 (return of ancient horn by which Pusey estates were held; cause of detention not stated; and see also REAL PROPERTY vol 39(2) (Reissue) PARA 89); *Somerset v Cookson* (1735) 3 P Wms 390 (Roman altar); *Lowther v Lowther* (1806) 13 Ves 95 (painting); *Lady Arundell v Phipps* (1804) 10 Ves 139 (family pictures); *Fells v Read* (1796) 3 Ves 70 (silver tobacco box). The special element in these cases was described as being a *pretium affectionis*: see *Nutbrown v Thornton* (1804) 10 Ves 159 at 163. See also the Torts (Interference with Goods) Act 1977 ss 3, 4 (as amended); and TORT; and see Fry on Specific Performance (6th Edn, 1985) pp 36-37; Jones and Goodhart *Specific Performance* (2nd Edn, 1996) pp 31-38; Spry *Equitable Remedies* (5th Edn, 1997) p 59. It is an open question in the law of contract whether the commercial uniqueness of goods (such as unavailability owing to industrial action, or availability only at great cost and delay) suffices for this purpose. Arguably, modern law is gravitating towards this position: see *Howard E Perry & Co Ltd v British Railways Board* [1980] 2 All ER 579, [1980] ICR 743; *Sky Petroleum Ltd v VIP Petroleum Ltd* [1974] 1 All ER 954, [1974] 1 WLR 576; *Mayflower Foods Ltd v Barnard Bros Ltd* (9 August 1996, unreported); but cf *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep 555, CA.

2 *Marco Productions Ltd v Pagola* [1945] KB 111, [1945] 1 All ER 155.

3 See generally EQUITY.

4 See generally CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq.

5 See generally SPECIFIC PERFORMANCE. Specific performance may be denied where the cost to the defendant of complying with such a decree is excessive and disproportionate in comparison to the loss caused to the plaintiff for the breach: *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, [1997] 3 All ER 297, HL.

6 See further EQUITY.

7 Supreme Court Act 1981 s 50. See generally EQUITY.

8 'The nature of the cause of action is immaterial; it may be in contract or tort': *Jaggard v Sawyer* [1995] 2 All ER 189 at 205, [1995] 1 WLR 269 at 284, CA, per Millett LJ.

9 Eg where no damages are awardable at common law because the relief sought is in respect of threatened and future wrongs for which no common law liability would arise: *Jaggard v Sawyer* [1995] 2 All ER 189 at 211, [1995] 1 WLR 269 at 290, CA, per Millett LJ.

## UPDATE

## **825 Damages and equitable remedies**

NOTE 7--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(i) Availability of Claim against Third Party/826. In general.

## **(2) GENERAL RULES ON ASSESSMENT OF DAMAGES**

### **(i) Availability of Claim against Third Party**

#### **826. In general.**

Where a claimant has a right of action against two obligors in respect of a particular matter, but brings an action against only one, the defendant cannot generally avoid or reduce his liability on the ground that the claimant, having a potential action against the other obligor, has not suffered the loss claimed<sup>1</sup>. The availability of any such alternative cause of action affords no defence to the particular obligor's liability to pay damages in full<sup>2</sup> unless the failure to pursue that liability constitutes a failure to take reasonable steps to mitigate the claimant's loss<sup>3</sup>. Where, however, a claimant who has concurrent claims against two obligors<sup>4</sup> in respect of the same matter recovers the whole or part of his loss from one of those obligors, the amount which the claimant thus recovers is applied in diminution of the damages which are awarded to him against the other obligor<sup>5</sup>. A claimant cannot recover more than the total sum due in respect of his loss, merely by reason of the fact that his claim may lie against more than one person<sup>6</sup>. The rule reflects a general judicial dislike of over-compensation<sup>7</sup>.

1 *International Factors Ltd v Rodriguez*[1979] QB 351 at 358-59, [1979] 1 All ER 17 at 21, CA, per Sir David Cairns (conversion; defendant director of original creditor company converted cheques mistakenly sent to that company by debtors; debtors already notified that the debts were assigned to plaintiff debt factors; no defence that plaintiff could have sued debtors on the original obligation, making them pay twice over); *London and South of England Building Society v Stone*[1983] 3 All ER 105, [1983] 1 WLR 1242, CA (mortgagee suing negligent valuer; liability of latter not reduced by prospect of action by mortgagee against mortgagor on personal covenant to repay loan secured by mortgage).

2 *International Factors Ltd v Rodriguez*[1979] QB 351 at 359, [1979] 1 All ER 17 at 21, CA, per Sir David Cairns.

3 *London and South of England Building Society v Stone*[1983] 3 All ER 105 at 116-117, [1983] 1 WLR 1242 at 1256-1257, CA, per O'Connor LJ, and at 120-122 and 1261-1264 per Stephenson LJ (action by mortgagee against valuer; not unreasonable for mortgagee of negligently valued premises to forego enforcement of mortgagor's covenant to pay).

4 The claims must be concurrent in the sense that they are truly alternative for the same damage, and seek the same relief in respect of the same damage: see *Boncristiano v Lohmann* (13 February 1998, unreported), Vict CA. As to concurrent causes of action against a single obligor see generally *Henderson v Merrett Syndicates Ltd*[1995] 2 AC 145, [1994] 3 All ER 506, HL.

5 *Burn v Morris* (1834) 3 LJ Ex 193; *Townsend v Stone Toms & Partners (a firm)* (1984) 27 BLR 26 at 38, CA, per Oliver LJ; *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128 at 138-139, CA, per Slade LJ; and see *Clark v Urquhart*[1930] AC 28 at 66, HL, per Lord Atkin; cf *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) Times, 11 February, CA, per Evans LJ (avoidance of double liability on the part of a single defendant). The fact that the causes of action by which the plaintiff proceeds against the various defendants are different is immaterial for the purpose of the principle stated in the text: *Townsend v Stone Toms & Partners (a firm)* supra at 49 per Purchas LJ; *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd (No 2)*[1988] 2 All ER 880 at 881-882 per Steyn J; and see *Boncristiano v Lohmann* (13 February 1998, unreported), Vict CA. Moreover, it appears to be immaterial that the sum received by the plaintiff from the paying defendant was paid by way of compromise rather than in satisfaction of a judgment for damages: *Bryanston Finance Ltd v De Vries*[1975] QB 703 at 722, [1975] 2 All ER 609 at 618-619, CA, per Lord Denning MR; and see *Boncristiano v Lohmann* supra. As to the burden of showing that a particular sum received from one defendant is attributable to a cause of action concurrent with one against another defendant, see *Townsend v Stone Toms & Partners (a*

*firm*) supra at 41 per Oliver LJ, at 51 per Purchas LJ, and at 56 per Waller LJ; see also *Boncristiano v Lohmann* supra.

6 See *Townsend v Stone Toms & Partners (a firm)* (1984) 27 BLR 26 at 38, CA, per Oliver LJ, and at 49 per Purchas LJ. As to contribution between wrongdoers see PARA 837 et seq post. As to mitigation of loss see PARAS 859, 1041 et seq post. As to recovery of the costs of prior litigation involving a party other than the immediate defendants see PARA 827 et seq ante.

7 *Townsend v Stone Toms & Partners (a firm)* (1984) 27 BLR 26 at 49, CA, per Purchas LJ; and see *Boncristiano v Lohmann* (13 February 1998, unreported), Vict CA. As to the compensatory function of damages generally see PARA 815 et seq ante.

## **UPDATE**

### **826-850 General Rules on Assessment of Damages**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### **826 In general**

NOTE 5--*Alfred McAlpine*, cited, reversed on different grounds: [2000] 4 All ER 97, HL.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(ii) Recovery of Expenses Incurred in Other Proceedings/827. Introduction.

## **(ii) Recovery of Expenses Incurred in Other Proceedings**

### **827. Introduction.**

Where a person has been involved in previous civil or criminal proceedings owing to the wrong of another, it may be possible for him to bring a fresh action to recover, as damages, any damages or fines and costs which he has been ordered to pay and the costs which he has incurred in prosecuting or defending the earlier proceedings. The earlier proceedings may have been between the present parties or between the present plaintiff and a person other than the present defendant; the present plaintiff may have been plaintiff or defendant and he may have won or lost, in whole or in part<sup>1</sup>, or settled<sup>2</sup>. Analogous situations arise where, though there has not actually been a prior action, the present plaintiff has settled a claim against him by another or counterclaimed<sup>3</sup>, or a present defendant seeks indemnity from another by joining that person as a third party<sup>4</sup> or claiming against him if he is a co-defendant<sup>5</sup>; similarly, there may have been interpleader proceedings the costs of which are now claimed in the current action<sup>6</sup>. The previous proceedings may have been arbitration proceedings<sup>7</sup>, and the present proceedings may be a proof in the liquidation of the company<sup>8</sup>.

The main division is between those cases where the present defendant was a party to previous proceedings brought by or against the present plaintiff<sup>9</sup> and those cases where the previous proceedings were between the present plaintiff and a different party<sup>10</sup>. Considerations of public policy intrude when the previous proceedings were criminal<sup>11</sup>. A subsidiary division is between fresh proceedings in contract and in tort, which is relevant to the measure and remoteness of damage; the nature of the previous proceedings<sup>12</sup> is not significant.

The recoverability of such damages and costs is subject to the normal rules of remoteness of damage which obtain in tort and contract<sup>13</sup>. In tort the damage sustained must have been reasonably foreseeable, and in contract it must flow naturally from the wrong of the present defendant or have been in the contemplation of the parties when the contract was made. Any costs incurred in bringing or defending proceedings must have been reasonably incurred; the issue is important in proceedings involving a person other than the present defendant<sup>14</sup>. A successful litigant will normally recover from his opponent all costs reasonably incurred<sup>15</sup>; these may include non-litigation costs<sup>16</sup>. There is likely, however, to be a shortfall between such taxed costs and the present plaintiff's own solicitor-client costs, and the present plaintiff will then be endeavouring to recover his extra costs from the present defendant. He will in any event be unable to recover from an impecunious opponent, in which case he may recover from the present defendant who caused him to become involved in the earlier litigation<sup>17</sup>. Where the present plaintiff was defeated in the previous proceedings, he will be attempting to recover all his reasonably incurred costs; these will not have suffered prior taxation.

The right to recover costs as damages must be distinguished from any right to recover under an express or implied contract of indemnity, and a successful party may thereby be entitled to more than costs awarded on a standard basis<sup>18</sup>. A right to be indemnified against liability to another will turn upon the construction of the contract and whether the present plaintiff has relied upon any express or implied warranty<sup>19</sup>.

Costs or extra costs cannot be awarded as damages to a successful plaintiff in the same action<sup>20</sup>, nor to any party in the same proceedings<sup>21</sup>. Costs or extra costs cannot be recovered from the same person in a later action<sup>22</sup>, though they may against another party<sup>23</sup>.



- 1 *Agius v Great Western Colliery Co* [1899] 1 QB 413 is an example of a previous defendant succeeding in part; he had paid sufficient money into court and obtained taxed costs from the earlier successful plaintiff.
- 2 *Mowbray v Merryweather* [1895] 2 QB 640.
- 3 See eg *Penn v Bristol and West Building Society* [1997] 3 All 470, [1997] 1 WLR 1356, CA.
- 4 See eg *Oliver v Bank of England* [1901] 1 Ch 652 (affd on other grounds [1903] AC 114, HL); *Williams v Lister L & Co* (1914) 109 LT 699; *The Kate* [1935] P 100; *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694, [1954] 1 WLR 1286; *Yeoman Credit Ltd v Odgers, Vospers Motor House (Plymouth) Ltd* [1962] 1 All ER 789, [1962] 1 WLR 215.
- 5 See eg *Parker v Oloxo Ltd and Senior* [1937] 3 All ER 524.
- 6 See eg *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 QB 764, [1964] 2 All ER 732.
- 7 See eg *Great Western Rly Co v Fisher* [1905] 1 Ch 316; *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314, [1951] 2 All ER 191, CA.
- 8 See eg *Re Famatina Development Corp* [1914] 2 Ch 271.
- 9 See PARA 828 post.
- 10 See PARA 829 post. In this context, the term 'third party' is better avoided to avoid any confusion with third party proceedings; see the text to note 3 supra.
- 11 See PARA 832 post.
- 12 They may be actions in contract or tort or Chancery proceedings (eg for specific performance, for an account or for discovery (when this was not available at law)): see eg *Grant v Jackson* (1793) Peake 268.
- 13 See PARAS 851 et seq, 1015 et seq post.
- 14 See PARA 829 post.
- 15 Successful litigants are entitled to their costs on either a standard basis (similar to the old common fund basis) or on an indemnity basis. In brief, costs on the standard basis are those costs which have been reasonably incurred and costs on an indemnity basis include any costs which are not unreasonable; the difference is essentially one of burden of proof. See generally the Supreme Court Act 1981 s 51 (substituted by the Courts and Legal Services Act 1990 s 4(1)); RSC Ord 62 r 12; and CIVIL PROCEDURE. The court can order costs against a person who is not a party to the present proceedings: *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] AC 965, [1986] 2 All ER 409, HL.  
Previously, a successful litigant could recover from his opponent only those costs which he had necessarily incurred (ie costs on the old party and party basis; there was therefore an incentive to sue for extra costs. The older authorities should thus be read in the light of the 'new dispensation' (Steyn J's expression in *Seavision Investment SA v Evennett, The Tiburon* [1992] 2 Lloyd's Rep 26, (1992) Times, 29 January, CA).
- 16 *Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA.
- 17 See *Britannia Hygienic Laundry Co v Thornycroft & Co* (1925) 94 LJKB 858; revsd on other grounds (1926) 95 LJKB 237, CA.
- 18 See *Gomba Holdings UK Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA.  
As to contracts of indemnity see generally FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1255 et seq. Any contract by a party to pay the costs of an action in which he does not have a proper interest is illegal as amounting to maintenance and cannot be enforced, notwithstanding the fact that maintenance and champerty were abolished as crimes and torts by the Criminal Law Act 1967 ss 13, 14; see further CONTRACT vol 9(1) (Reissue) PARAS 850-855; but note the effect of the Courts and Legal Services Act 1990 s 58 (conditional fees); and see LEGAL PROFESSIONS vol 66 (2009) PARA 953. See also *Thai Trading Co (a firm) v Taylor* [1998] 3 All ER 65, CA.
- 19 In *Mowbray v Merryweather* [1895] 2 QB 640, CA the plaintiff (who had settled an action brought against him by his injured workman and had not improperly incurred any costs in defending ) was entitled to rely on assurances from the defendant that equipment supplied by the defendant was fit for its purpose, but in *Hadley v Droitwich Construction Co Ltd (Joseph Pugsley & Sons Ltd)* [1967] 3 All ER 911, [1968] 1 WLR 37, CA, the

claim of the hirer of a crane, which had injured the plaintiff, to be indemnified by a co-defendant (the owner of the crane) failed and no question of recovering costs evidently arose (note that the co-defendant owner brought in the manufacturer). Similarly in *Lexmead (Basingstoke) Ltd v Lewis* [1982] AC 225, sub nom *Lambert v Lewis* [1981] 1 All ER 1185, HL, no question of recovering costs (incurred in defending unsuccessfully the main proceedings) in third party proceedings arose since they failed (the warranty implied by the Sale of Goods Act 1893 s 14(1) (now repealed and replaced) having expired when the goods no longer remained in the same apparent state).

'In a case where A has been held liable to X, a stranger, for negligent failure to take a certain precaution, he may recover over from someone with whom he has a contract only if by that contract the other party has warranted that he need not ... take the very precautions for the failure to take which he has been held liable in law to the plaintiff': *Hadley v Droitwich Construction Co Ltd (Joseph Pugsley & Sons Ltd)* supra at 914 and at 43 per Winn LJ, discussing the principle in *Mowbray v Merryweather* supra.

20 *Cockburn v Edwards* (1881) 18 ChD 449, CA (apparently the one reported instance where this has been attempted).

21 See *Penn v Bristol and West Building Society* [1997] 3 All ER 470, [1997] 1 WLR 1356, CA.

22 *Hathaway v Barrow* (1807) 1 Camp 151.

23 See PARA 829 post.

## UPDATE

### 826-850 General Rules on Assessment of Damages

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 827 Introduction

NOTE 15--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(ii) Recovery of Expenses Incurred in Other Proceedings/828. Previous proceedings between same parties.

### **828. Previous proceedings between same parties.**

No party to any proceedings is entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the court<sup>1</sup>. A person who has been successful, as plaintiff or defendant, in earlier proceedings between himself and the present defendant cannot in another action recover his costs or 'extra costs' (in other words the difference between the taxed costs awarded to him and those between himself and his own solicitor<sup>2</sup>), nor can he bring an action to recover costs refused by the earlier tribunal<sup>3</sup>. Such proceedings would tend to defeat the rules of court relating to the court's powers and discretion to award costs<sup>4</sup>. Costs incurred in foreign proceedings cannot be recovered in an English action between the same parties<sup>5</sup>.

However, where the wrongful instigation of previous proceedings constitutes a recognisable tort, a claim for the costs incurred in the previous proceedings may in principle be included<sup>6</sup>, but the matter is undecided as far as previous civil proceedings are concerned. The bringing of an ordinary civil action, however maliciously and without want of reasonable cause, will not support an action for malicious prosecution<sup>7</sup>, except in the case of insolvency proceedings<sup>8</sup>. Falsely and maliciously presenting a bankruptcy petition is actionable on the ground of injury to credit<sup>9</sup>, and the costs of securing its dismissal may possibly be included in a damages claim. Falsely and maliciously bringing a petition to wind up a company is necessarily injurious to the company, but its liability to pay the costs of defending such a petition is not sufficient in itself to found an action<sup>10</sup>. In the case of a criminal malicious prosecution the matter is clearer: an action will lie to recover costs and extra costs over and above those awarded by the criminal court, even where there is no injury to reputation as a head of damage<sup>11</sup>. In an action for false imprisonment, a plaintiff is entitled to recover the costs of securing his discharge<sup>12</sup>, but any such costs must have been reasonably incurred and he has no right to them *ex debito justitiae*<sup>13</sup>. Conspiracy is another tort where it might be possible in principle to include a claim for the full or extra costs of defending earlier proceedings, but there is no authority<sup>14</sup>.

1 RSC Ord 62 r 3(2). Nor can costs be recovered as damages in the same proceedings: *Cockburn v Edwards* (1881) 18 ChD 449, CA; *Seavision Investment SA v Evennett, The Tiberon* [1992] 2 Lloyd's Rep 26, (1992) Times, 29 January.

2 *Hathaway v Barrow* (1807) 1 Camp 151 (conspiracy to prevent plaintiff from obtaining discharge from bankruptcy); *Doe v Filliter* (1844) 13 M & W 47 (taxed costs intended to be a full indemnity); *Quartz Hill Consolidated Gold Mining Co Ltd v Eyre* (1883) 11 QBD 674 at 682-683, CA, per Brett MR; *Lonrho plc v Fayed (No 5)* [1994] 1 All ER 188 at 207, [1993] 1 WLR 1489 at 1505, CA, per Stuart-Smith LJ, and at 211-212 and 1510 per Evans LJ.

3 *Loton v Devereux* (1832) 3 B & Ad 343 (the later action was against the attorney of the previous plaintiff). There are naturally no reported cases of an unsuccessful party bringing a fresh action to recover damages or costs awarded against him, or costs incurred, in a previous action between himself and the present defendant.

4 See CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

5 *Jack L Israel Ltd v Ocean Dynamic Lines SA, The Ocean Dynamic* [1982] 2 Lloyd's Rep 88.

6 *Berry v British Transport Commission* [1962] 1 QB 306 at 322, [1961] 3 All ER 65 at 72, CA, per Devlin LJ.

7 *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 688, CA, per Bowen LJ.

8 In *Gregory v Portsmouth City Council* [1997] 46 LS Gaz R 29, CA, the court refused to extend the scope of the tort of malicious prosecution beyond the existing categories, ie insolvency proceedings and most criminal proceedings. Note that 'prosecution' is used generally to include the bringing of civil proceedings.

9 *Johnson v Emerson* (1871) LR 6 Exch 329; and see *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 684-685, CA, per Brett MR.

10 *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674, CA (the company had been wrongly nonsuited and a new trial was ordered).

11 *Berry v British Transport Commission* [1962] 1 QB 306, [1961] 3 All ER 65, CA. As to malicious prosecution generally see TORT.

12 *Pritchett v Boevey* (1833) 1 Cr & M 775; distinguishing *Loton v Devereux* (1832) 3 B & Ad 343 where costs had been refused; *Foxall v Barnett* (1853) 23 LJQB 7 (costs of quashing inquisition held without jurisdiction recovered from coroner).

13 *Bradlaugh v Edwards* (1861) 11 CBNS 377 (jury was entitled to award one farthing nominal damages only to the 'ungodly' plaintiff although plaintiff had expended £7.14s.0d in securing bail). A court will not normally interfere with the damages assessed by a jury (*Williams v Currie* (1845) 1 CB 841); the same principle will apply to damages awarded by a judge alone.

14 See for authority to the contrary *Hathaway v Barrow* (1807) 1 Camp 151 (defendants convicted of conspiracy to prevent plaintiff from securing his discharge as a bankrupt). In *Lonrho plc v Fayed (No 5)* [1994] 1 All ER 188, [1993] 1 WLR 1489, CA (an action for conspiracy) the court struck out a head of claim for the costs of defending other proceedings since the present defendants had aligned themselves with the plaintiffs in those proceedings and so rendered themselves liable for a costs order in those proceedings.

## UPDATE

### 826-850 General Rules on Assessment of Damages

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 828 Previous proceedings between same parties

TEXT AND NOTE 5--*Jack L Israel Ltd*, cited, distinguished in *Union Discount Co Ltd v Zoller* [2001] All ER (D) 312 (Nov), CA (costs could be recovered in certain circumstances).

NOTE 6--See *A v B (No 2)* [2007] EWHC 54 (Comm), [2007] 1 All ER (Comm) 633.

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### **829. Previous proceedings between present plaintiff and different party; in general.**

Where, owing to the wrong of the present defendant, the present plaintiff has been involved, as plaintiff or defendant, successfully or unsuccessfully, in previous legal proceedings with a party other than the present defendant he may, in the action against the present defendant, recover damages and costs suffered or incurred in the earlier proceedings<sup>1</sup>. In all cases, any costs must have been reasonably incurred, otherwise they are too remote and cannot be recovered in tort or contract on general principles<sup>2</sup>. Costs are not too remote to be recovered as damages if they were reasonably incurred<sup>3</sup>.

Where there have not actually been earlier proceedings but one party counterclaims or claims against another defendant or a third party, costs must be awarded under the court's statutory jurisdiction to award costs<sup>4</sup>, but the court's discretion thereunder should be normally exercised so as to give to the litigant what he could have obtained had there been a separate action to recover such costs<sup>5</sup>. The fact that his costs or extra costs could have been the subject of a separate action is not a ground for the court to award damages on an indemnity basis<sup>6</sup>.

1 *The Solway Prince* (1914) 31 TLR 56; following *Agius v Great Western Colliery Co* [1899] 1 QB 413, CA a case where the present plaintiff, though unsuccessful, obtained costs after paying sufficient money into court. Costs cannot be recovered in a further action between the same parties: see PARA 828 ante.

2 *The Wallsend* [1907] P 302; *Tindall v Bell* (1843) 11 M & W 228; *Ronneberg v Falkland Islands Co* (1864) 17 CBNS 1; *Godwin v Francis* (1870) LR 5 CP 295; *South Wales and Liverpool Steamship Co Ltd v Maatschappij SS Bestevaer, Rotterdam* (1913) 108 LT 568; *Smith v Spurling Motor Bodies Ltd* (1961) 105 Sol Jo 967, CA.

3 Thus placing the costs with the head in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 et seq post. See also *Biggin & Co Ltd v Permanite Ltd* [1951] 1 KB 422 (revsd on appeal [1951] 2 KB 314, CA) (compromise); cf *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 154 ACR 361, Aust HC. The older test was whether the costs were the natural and necessary consequence of the present defendant's fault: *Fisher v Val de Travers Asphalte Co* (1876) 1 CPD 511 (costs disallowed though jury had found they were reasonably incurred).

4 Under the Supreme Court Act 1981 s 51 (substituted by the Courts and Legal Services Act 1990 s 4(1)); and see also RSC Ord 62 r 3.

5 *Seavision Investment SA v Evennett, The Tiburon* [1992] 2 Lloyd's Rep 26 at 28, (1992) Times, 29 January, CA, per Parker LJ.

6 See *Penn v Bristol and West Building Society* [1997] 3 All ER 470, [1997] 1 WLR 1356, CA (the purpose of RSC Ord 62 r 3(2) is to prevent costs being included in an award of damages in third party and other proceedings).

## **UPDATE**

### **826-850 General Rules on Assessment of Damages**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **829 Previous proceedings between present plaintiff and different party; in general**

NOTE 3--See *Royal Brompton Hospital NHS Trust v Hammond* [1999] BLR 162 (principle that costs must be reasonably incurred applied regardless of the fact that the plaintiff compromised its counterclaim and that the compromise included matters of liability as well as quantum).

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### **830. Present plaintiff successful against another party.**

Where the present plaintiff was successful as plaintiff<sup>1</sup> or defendant<sup>2</sup> in the earlier proceedings, he may in another action recover his extra costs, in other words costs over and above the taxed costs awarded or recovered in the first action. This privilege has been questioned<sup>3</sup>. The present plaintiff may also recover from the present defendant costs which, though awarded to him in the previous proceedings, he has been unable to recover from an impecunious litigant<sup>4</sup>. Though successful in the earlier proceedings, a litigant cannot later recover his costs if the earlier court refused his costs<sup>5</sup>; he may however be able to recover his costs later when no order at all was made<sup>6</sup>. If the present plaintiff has successfully defended earlier proceedings his costs will have been reasonably incurred<sup>7</sup>, but this may not be the case where the plaintiff successfully brought the previous proceedings<sup>8</sup>.

However, if a plaintiff or defendant or third party is successful against one party he cannot, in those same or subsequent proceedings, recover costs or extra costs as damages from another party to those proceedings. His only entitlement is to whatever discretionary order is made by the court in those proceedings in accordance with the rules of court<sup>9</sup>.

1 See *Henderson v Squire* (1869) LR 4 QB 170; *The Solway Prince* (1914) 31 TLR 56; *British Racing Drivers' Club Ltd v Hextall Erskine & Co (a firm)* [1996] 3 All ER 667, [1997] 1 BCLC 182. In *Morton-Norwich Products Inc v Intercen Ltd (No 2)* [1981] FSR 337, the plaintiffs recovered the costs of earlier discovery proceedings against Customs and Excise; cf *Dormeuil Frères SA v Feraglow Ltd* [1990] RPC 449 (trade marks action; costs of putting innocent manufacturers on notice recovered).

2 See *Agius v Great Western Colliery Co* [1899] 1 QB 413, CA (successful in part only); *Williams v Lister* (1913) 109 LT 699; *Re Famatina Development Corpn* [1914] 2 Ch 271, CA (proof in liquidation); *Britannia Hygienic Laundry Co v Thornycroft & Co* (1925) 94 LJBK 858 (revsd on other grounds (1925) 95 LJBK 237, CA).

3 See *Seavision Investment SA v Evennett, The Tiburon* [1992] 2 Lloyd's Rep 26 at 35, (1992) Times, 29 January, CA, per Scott LJ; *Lonrho plc v Fayed (No 5)* [1994] 1 All ER 188 at 212, [1993] 1 WLR 1489 at 1510, CA, per Evans LJ. These dicta have been applied at first instance in the analogous situation of an attempt to recover costs over and above those accepted in settlement of earlier proceedings: *British Racing Drivers' Club Ltd v Hextall Erskine & Co (a firm)* [1996] 3 All ER 667, [1997] 1 BCLC 182 per Carnwath J. The argument is that the fiction that taxed costs are a sufficient indemnity is no longer such a fiction now that costs must be awarded on the standard or indemnity basis (see RSC Ord 62 r 12) instead of the old party and party costs basis. These attempts at upsetting well established doctrine have been considered to be misconceived and that the 'new dispensation' should not affect the rule that a successful litigant is entitled to full indemnity for all the reasonably incurred costs of other proceedings in which he has been involved owing to the wrong of the present defendant: see McGregor on Damages (16th Edn, 1997) PARAS 753, 1866. There will still be shortfall between such costs and taxed costs.

4 *Britannia Hygienic Laundry Co v Thornycroft & Co* (1925) 94 LJBK 85 (revsd on other grounds (1925) 95 LJBK 237, CA); *Williams v Lister* (1913) 109 LT 699 (agent entitled to be indemnified by third party principal for costs not recovered from previous plaintiff).

5 *Loton v Devereux* (1832) 3 B & Ad 343, where the present action was against the attorney of the previous plaintiff.

6 *Pritchett v Bovey* (1833) 1 Cr & M 775 (a case between the same parties, where the present plaintiff had been illegally arrested on mesne process); *Henderson v Squire* (1869) LR 4 QB 170 (present plaintiff recovered costs of ejecting defendant's under-tenant).

7 See the cases cited in note 2 supra.

8 *Holloway v Turner* (1845) 6 QB 928, where costs were incurred in setting aside a judgment after a complete remedy had been obtained; cf *Foxall v Barnett* (1853) 2 E & B 928, 23 LJQB 7.

9 le in accordance with RSC Ord 62: see generally CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

## **UPDATE**

### **826-850 General Rules on Assessment of Damages**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(ii) Recovery of Expenses Incurred in Other Proceedings/831. Present plaintiff unsuccessful against another party.

### **831. Present plaintiff unsuccessful against another party.**

There are cases where it was the present plaintiff who brought the previous proceedings and who blames the present defendant for the outcome<sup>1</sup>. Here the present plaintiff will be seeking to recover just the wasted costs of his former litigation. Cases are sparse, but plaintiffs have recovered from the current defendants the costs of the former unsuccessful actions where the latter had been guilty of breach of warranty of authority and the present plaintiffs had sued the supposed principals<sup>2</sup>. Although there has not been a previous action, analogous situations arise where the present plaintiff incurs costs in unsuccessfully joining another second defendant<sup>3</sup> or the present defendant joins a third party<sup>4</sup> or in claiming in interpleader proceedings<sup>5</sup>. Where a litigant thus recovers his costs from one party in respect of his action against another in the same proceedings, such costs must be awarded under the court's statutory jurisdiction to award costs<sup>6</sup> but the court's discretion thereunder should normally be exercised so as to give to the litigant what he could have obtained had there been a separate action to recover such costs<sup>7</sup>. In all cases, whether there has been one or two sets of proceedings, it must have been reasonable for the plaintiff or other litigant to have brought the previous proceedings or joined another; it is reasonable to have relied on the continuing representations of the present defendant<sup>8</sup> or to have acted on the suggestion of the present defendant<sup>9</sup>; it may only have been reasonable to continue with the action up to a certain point<sup>10</sup>.

The most common permutation is where the present plaintiff has unsuccessfully defended civil proceedings brought against him by a person other than the present defendant<sup>11</sup>; here the present plaintiff will be seeking to recover the damages<sup>12</sup> awarded against him together with the costs of the previous action. By analogy, a defeated defendant may claim against a co-defendant in the same action<sup>13</sup>. These costs will include any costs, taxed or agreed, which he has paid to the plaintiff in the earlier proceedings and his own reasonable solicitor and client costs<sup>14</sup>. The liability of the present plaintiff in the earlier action must have been the foreseeable consequence of the present defendant's breach of duty, if the present plaintiff now sues in tort; or the natural consequence of the present defendant's breach of contract, and such as might reasonably be supposed to have been within the contemplation of the parties when the contract was entered into<sup>15</sup>. Costs are not too remote to be recovered as damages if they were reasonably incurred<sup>16</sup>. It might be reasonable to appeal the earlier decision if there is a difference of opinion in that court<sup>17</sup>.

The earlier proceedings often arise from string contracts where a buyer, the present plaintiff, has sold unsatisfactory goods on to another<sup>18</sup>. In this category of case the prima facie measure of damages provided by common law and statute (the difference in value) is displaced in favour of the loss directly and naturally flowing from the breach of warranty<sup>19</sup>. The present plaintiff may have been unable to perform his own contract with another owing to the default of the present defendant in his contractual obligation to the present plaintiff<sup>20</sup>. Other cases have arisen from contracts of carriage<sup>21</sup>, tenants or sub-tenants holding over<sup>22</sup>, sub-contractors<sup>23</sup>, agency<sup>24</sup>, injunction and account of profits<sup>25</sup>, negligence or breach of contract<sup>26</sup>, breach of covenant to repair<sup>27</sup>, and hire-purchase<sup>28</sup>. However, the present plaintiff will not recover his costs unless it was reasonable for him to have defended the earlier action<sup>29</sup> or unless he did so at the instigation of the present defendant<sup>30</sup>. Any damages which the present plaintiff has had to pay will be recoverable whether or not it was reasonable to defend the action<sup>31</sup>, but if the present plaintiff does not recover from the present defendant the damages he had to pay to

the previous plaintiff he will not recover from the present defendant the costs of the previous action<sup>32</sup>.

1 As to previous proceedings between the present plaintiff and a different party see PARA 829 ante.

2 *Randell v Trimen* (1856) 18 CB 786 (action for the price); *Collen v Wright* (1857) 7 E & B 301; and *Hughes v Graeme* (1864) 33 LQB 335 (suit for specific performance); *Godwin v Francis* (1870) LR 5 CP 295 (present plaintiff had sued another for breach of contract; costs reasonably incurred up only to a certain point).

3 *Bowmaker (Commercial) Ltd v Day* [1965] 2 All ER 856n, 1 WLR 1396.

4 *Oliver v Bank of England* [1901] 1 Ch 652; *Bowmaker (Commercial) Ltd v Day* [1965] 2 All ER 856n, 1 WLR 1396.

5 *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 QB 764, [1964] 2 All ER 732.

6 le under the Supreme Court Act 1981 s 51 (substituted by the Courts and Legal Services Act 1990 s 4(1)); see also RSC Ord 62 r 3; and CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

7 *Seavision Investment SA v Evennett, The Tiburon* [1992] 2 Lloyd's Rep 26 at 28, (1992) Times, 29 January, CA, per Parker LJ.

8 *Randell v Trimen* (1856) 18 CB 786; *Collen v Wright* (1857) 7 E & B 301.

9 *Lloyds & Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 QB 764, [1964] 2 All ER 732 (claim presented in interpleader proceedings).

10 *Godwin v Francis* (1870) LR 5 CP 295 (plaintiff should not have continued after receiving answers to interrogatories from former defendants); *Chr Salvesen v Redderi Aktiebolaget Nordsjerner* [1905] AC 302, HL.

11 *Mainwaring v Brandon* (1818) 8 Taunt 202; *Tindall v Bell* (1843) 11 M & W 228; *Sidney Bennett Ltd v Kreeger* (1925) 41 TLR 609; *The Kate* [1935] P 100.

12 This could instead be a liability in restitution as when an account has been ordered against the present plaintiff: see *Dixon v Fawcus* (1861) 3 E & E 537 (claim in fact compromised).

13 *Parker v Oloxo Ltd and Senior* [1937] 3 All ER 524 (hairdresser recovered damages and costs she had to pay to customer from co-defendant supplier of hair dye).

14 *Hammond & Co v Bussey* (1887) 20 QBD 79, CA.

15 *Hammond & Co v Bussey* (1887) 20 QBD 79, CA; *Mowbray v Merryweather* (1895) 2 QB 640 (present plaintiff had settled claim by injured workman (no costs involved)). See also *Biggin & Co Ltd v Permanite Ltd* [1951] 1 KB 422 (revsd on appeal [1951] 2 KB 314, CA) (compromise); cf *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 154 ACR 361, Aust HC.

16 Thus placing the costs with the head in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 et seq post. The older test was whether the costs were the natural and necessary consequence of the present defendant's fault: *Fisher v Val de Travers Asphalte Co* (1876) 1 CPD 511 (costs disallowed though jury had found they were reasonably incurred).

17 *Sutton v Baillie* (1891) 65 LT 528; cf *Vogan & Co v Oulton* (1898) 79 LT 384 (appeal costs disallowed).

18 See *Mainwaring v Brandon* (1818) 8 Taunt 202. The leading case on string contracts is *Hammond & Co v Bussey* (1887) 20 QBD 79, CA (coal unsuitable for steamers). See also *Pinnock Bros v Lewis and Peat Ltd* [1923] 1 KB 690; *Sidney Bennett Ltd v Kreeger* (1925) 41 TLR 609; *Kasler & Cohen v Slavouski* [1928] 1 KB 78; *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314, [1951] 2 All ER 191, CA; cf *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 154 ACR 361, Aust HC.

19 See the Sale of Goods Act 1979 s 53(2), (3); and *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 100-101, [1997] 1 All ER 979 at 989-991, CA, per Otton LJ, and at 102-102 and 991-992 per Auld LJ (there was no previous action, though a claim was settled, nor was a string contract involved).

20 *Agius v Great Western Colliery Co* [1899] 1 QB 413, CA (late delivery of coal which present plaintiff had sold on to shipowners).

- 21 *Mors-le-Blanch v Wilson* (1873) LR 8 CP 227, HL; *Baxendale v The London Chatham and Dover Rly* (1874) LR 10 Exch 35.
- 22 *Bramley v Chesterton* (1857) 2 CBNS 592; *Henderson v Squire* (1869) LR 4 QB 170 (costs of ejecting present defendant's under-tenant recovered by head landlord).
- 23 *Fisher v Val de Travers Asphalte Co* (1876) 1 CPD 511.
- 24 *Randell v Trimen* (1856) 18 CB 786; *Collen v Wright* (1857) 7 E & B 301 (affd 8 E & B 647); *Pow v Davis* (1861) 1 B & S 220.
- 25 *Dixon v Fawcus* (1861) 3 E & E 537.
- 26 *The Kate* [1935] P 100; *Parker v Oloxo Ltd and Senior* [1937] 3 All ER 524; *Osman v J Ralph Moss Ltd* [1970] 1 Lloyd's Rep 313, CA.
- 27 *Short v Kalloway* (1839) 11 Ad & E 28; *Clare v Dobson* [1911] 1 KB 35 (costs of relief against forfeiture not recovered by head lessor from sub-tenant).
- 28 *Butterworth v Kingsway Motors Ltd* [1954] 2 All ER 694, [1954] 1 WLR 1286; *Smith v Spurling Motor Bodies Ltd* (1961) 105 Sol Jo 967, CA; *Yeoman Credit Ltd v Odgers, Vospers Motor House (Plymouth) Ltd* [1962] 1 All ER 789, [1962] 1 WLR 215, CA.
- 29 'No person has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend': *Short v Kalloway* (1839) 11 Ad & E 28 at 31 per Lord Denman CJ. See also *Pow v Davis* (1861) 1 B & S 220 (lease would not have been valid even if defendant had authority to grant it); *Ronneburg v Falkland Islands Co* (1864) 17 CBNS 1 (no defence to not being able to honour, on account of defendant's wrong, bill of lading); *The Wallsend* [1907] P 302; *Smith v Spurling Motor Bodies Ltd* (1961) 105 Sol Jo 967, CA (no defence to claim by finance company).
- 30 *Hammond & Co v Bussey* (1887) 20 QBD 79, CA (present defendant insisted coal was suitable for steamers even after he had notice of the claim against present plaintiff); cf *Walker v Hatton* (1842) 10 M & W 249.
- 31 *Ronneburg v Falkland Islands Co* (1864) 17 CBNS 1; *Baxendale v The London Chatham and Dover Rly* (1874) LR 10 Exch 35.
- 32 *Short v Kalloway* (1839) 11 Ad & E 28 (new trial refused, some blame must have attached to present plaintiff).

## UPDATE

### 826-850 General Rules on Assessment of Damages

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 831 Present plaintiff unsuccessful against another party

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### **832. Expense incurred in criminal proceedings.**

Where costs or a fine have been incurred by a plaintiff in previous criminal proceedings brought against him, questions of public policy arise if he later attempts to recover these from the person whose wrong caused the prosecution<sup>1</sup>. Prosecutions may be discouraged<sup>2</sup>, and the burden of punishment is said to be personal to the offender and should not be capable of being passed on to another<sup>3</sup>. Cases have tended to involve regulatory offences<sup>4</sup> rather than crimes requiring mens rea<sup>5</sup>, and the subsequent civil actions have been for breach of contract<sup>6</sup>, tort<sup>7</sup> or both<sup>8</sup>. The usual principles of remoteness of damage apply, that is (broadly) foreseeability in tort<sup>9</sup> and contemplated loss in breach of contract<sup>10</sup>.

If the plaintiff is acquitted, his costs, in so far as they were reasonably incurred, will be recoverable from the defendant whose wrong caused the prosecution<sup>11</sup>. Where the plaintiff is convicted, his costs, and any fine imposed or costs he is ordered to pay, may still be recoverable if it is shown that his conviction arose without any negligence, dishonesty or other fault on his part<sup>12</sup>. If there is doubt as to his total lack of fault, he may again recover his own costs and any prosecution costs he was ordered to pay, though not his fine<sup>13</sup>. If there is any clear fault on the part of the plaintiff, and this will be apparent if he has failed to deploy an available defence<sup>14</sup>, then he can recover neither his costs nor any fine<sup>15</sup>.

1 'I know of no case in which a person who has committed an act, declared by the law to be criminal, has been permitted to recover compensation against a person who has acted with him in the commission of the crime': *Colburn v Patmore* (1834) 1 Cr M & R 73 at 83 per Lord Lyndhurst, where the proprietor of a newspaper was convicted of publishing a libel though it had been inserted by his editor without his knowledge. In the event the plaintiff failed on his pleading. In *Burrows v Rhodes* [1899] 1 QB 816, DC, where there had not in fact been a prosecution, *Colburn v Patmore* supra was distinguished on the ground that in that case knowledge had been imputed by law: 'I can see no ground of public policy upon which redress for consequent damage should be refused to the person so led to commit an offence by the false and fraudulent representations of fact which, in this case, as I understand their import, justified the doer in believing that he was acting in accordance with the law': *Burrows v Rhodes* supra at 831 per Kennedy J.

As to public policy see especially *Burrows v Rhodes* supra at 831 et seq. As to the effect of criminal conduct on damages generally see PARAS 835-836 post. As to void and illegal contracts see CONTRACT vol 9(1) (Reissue) PARA 836 et seq.

2 'Though this action will lie, yet it ought not to be favoured, but managed with great caution ... the plaintiff will be constrained to shew express malice and iniquity in the prosecution': *Savile v Roberts* (1699) 1 Ld Raym 374 at 381 per Holt CJ, in the context of actions for malicious prosecution.

3 'It is, I think, a principle of our law that the punishment inflicted by a criminal court is personal to the offender, and that the criminal courts will not entertain an action by the offender to recover an indemnity against the consequences of that punishment': *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35 at 38 per Denning J.

4 As to such offences see generally CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 15.

5 In *Colburn v Patmore* (1834) 1 Cr M & R 73 no statute or regulation was involved. The plaintiff was said to have been ignorant but legally cognisant of the offence: see further note 1 supra.

6 *Colburn v Patmore* (1834) 1 Cr M & R 73; *Crage v Fry* (1903) 67 JP 240; *Cointat v Myham & Son* [1913] 2 KB 220 (including damages for loss of business consequent on the conviction); *R Leslie v Reliable Advertising and Addressing Agency Ltd* [1915] 1 KB 652; *Proops v WH Chaplin & Co Ltd* (1920) 37 TLR 112, DC; *Payne v Ministry of Food* (1953) 103 L Jo 141.

7 *Burrows v Rhodes* [1899] 1 QB 816 (misrepresentation); *Berry v British Transport Commission* [1962] 1 QB 306, [1961] 3 All ER 65, CA (malicious prosecution); *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35 (fraud and conspiracy against directors, the action for breach of contract against the liquidated company having been stayed).

8 *Osman v J Ralph Moss Ltd* [1970] 1 Lloyd's Rep 313, CA.

9 'That in the course of driving he [the plaintiff] might be involved in an accident, and so involved because he himself was negligent, was clearly a foreseeable event ...': *Osman v J Ralph Moss Ltd* [1970] 1 Lloyd's Rep 313 at 317-318 per Edmund Davies LJ.

10 '[Damages] are not too remote, if they arise naturally out of the breach of contract and if the damages sustained may fairly and reasonably be considered to have been in the contemplation of both parties as the probable result of the breach': *Cointat v Myham & Son* [1913] 2 KB 220 at 222 per Lord Coleridge J. As to remoteness of damage in contract see generally para 1015 et seq post.

11 *Savile v Roberts* (1699) 1 Ld Raym 374; *Proops v WH Chaplin Ltd* (1920) 37 TLR 112, DC, where the plaintiff, who had been acquitted on a statutory defence of the offence of selling above the maximum price whisky obtained from the defendant, recovered the costs incurred in defending the summons (the whisky was under proof); *Berry v British Transport Commission* [1962] 1 QB 306, [1961] 3 All ER 65, CA, where in an action for malicious prosecution, the plaintiff, who was acquitted of a criminal charge (pulling the communication cord), recovered the extra costs which she incurred in the criminal proceedings over and above those awarded to her by the criminal court.

12 *Cointat v Myham & Son* [1913] 2 KB 220, where the plaintiff was convicted of selling unsound food supplied by the defendant; *Osman v J Ralph Moss Ltd* [1970] 1 Lloyd's Rep 313, CA, where the plaintiff, who apparently pleaded guilty, was convicted of the absolute offence of driving while uninsured owing to the negligence of his insurance brokers (the plaintiff also recovered from the defendant the damages he had to pay, but only some of his the costs he incurred, in the civil action against him).

13 *Crage v Fry* (1903) 67 JP 240, where the plaintiff was convicted of having for sale unsound food (tinned mackerel) supplied by the defendant (no explanation of why the fine had been so heavy, on which point see *Osman v J Ralph Moss Ltd* [1970] 1 Lloyd's Rep 313 at 318, CA).

14 Compare *Crage v Fry* (1903) 67 JP 240 and *Cointat v Myham & Son* [1913] 2 KB 220 (where the offence was absolute) with *R Leslie Ltd v Reliable Advertising and Addressing Agency Ltd* [1915] 1 KB 652 (where the statutory defence was not made out) and *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35 (where the available defence was not even pleaded).

15 *R Leslie Ltd v Reliable Advertising and Addressing Agency Ltd* [1915] 1 KB 652, where, by reason of the defendants' negligence, the plaintiff money lender was convicted of circularising a minor (Rowlatt J was doubtful about the decisions in *Crage v Fry* (1903) 67 JP 240 and *Cointat v Myham & Co* [1913] 2 KB 220, and awarded one shilling in damages for breach of contract); *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35, where the grossly negligent plaintiff was convicted of selling 'cocktails' unfit for human consumption which had been supplied by the defendants. In *Payne v Ministry of Food* (1953) 103 L Jo 141, the plaintiff was convicted of selling ordinary milk supplied by the defendant at a price applicable to 'Channel Island' milk and he recovered neither the fine nor the costs he was ordered to pay, but merely nominal damages for breach of contract. It seems that the plaintiff had prior warning that the milk had less than the statutory fat content. (If this was not so, *Payne v Ministry of Food* supra is clearly out of line with the cases supra).

## UPDATE

### 826-850 General Rules on Assessment of Damages

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(iii) Assessment Once and for All/833. Damages assessed once and for all.

### **(iii) Assessment Once and for All**

#### **833. Damages assessed once and for all.**

The damages that result from one and the same cause of action must be assessed and recovered once and for all<sup>1</sup>, and the plaintiff must sue in one action for all his loss, past, present and future, certain and contingent<sup>2</sup>. The sum awarded will be assessed on the basis of an immediate award even where, as in the case of a minor, there are possibilities of increase by investment and accumulation before the beneficiary will acquire the right freely to dispose of it<sup>3</sup>. However, if the court is satisfied that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages, the court may order the respondent to make an interim payment of such amount as it thinks just (not exceeding a reasonable proportion of the damages which are likely to be recovered by the plaintiff) after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely<sup>4</sup>.

The difficulty of estimating future and contingent loss may in some cases be reduced by the facts which have occurred up to the date of trial, for, while assessment should normally be as at the date of the breach of duty, notice can be taken at the trial of subsequent realities which reduce the limits of speculation<sup>5</sup>. In personal injury cases<sup>6</sup>, there are two statutory exceptions to the general principle that a lump sum must be awarded once and for all. First, the court may award provisional damages and at a later stage award further damages if the injured person's condition further deteriorates as a result of the injury<sup>7</sup>. Secondly, the court may, with the consent of the parties, make an order under which damages are wholly or partly to take the form of periodical payments<sup>8</sup>. The court does not have power to impose structured settlements but where such settlements are agreed, additional protection is now provided by statute<sup>9</sup>.

A second action cannot be brought in respect of the same cause of action, however great the loss that may be suffered in the future, and however unexpected the loss may be<sup>10</sup>, since the cause of action has become *res judicata*<sup>11</sup>. A second action can be brought in respect of a separate cause of action, as for example where a person, owing to negligence, suffers loss to his property and also personal injuries. It has been held that these are two separate causes of action and a separate action lies in respect of each<sup>12</sup>. Similarly, where it is agreed that all disputes arising out of a contract are to be submitted to arbitration, a party submitting a dispute as to the quality of goods supplied is not, after obtaining an award, estopped from submitting a second dispute concerning the description of the goods<sup>13</sup>. There is, however, a conflicting principle within this sphere, namely the well-established rule that a plaintiff is barred by cause of action estoppel from pursuing a claim which could have been litigated at the same time as a claim previously brought. It is an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings<sup>14</sup>.

1 *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 at 133, HL, per Lord Halsbury; *Gibbs v Cruikshank* (1873) LR 8 CP 454 at 460 per Bovill CJ; *Sanders v Hamilton* (1907) 96 LT 679; *Furness, Withy & Co Ltd v J & E Hall Ltd* (1909) 25 TLR 233; *Conquer v Boot* [1928] 2 KB 336. Periodical payments and annuities may not be awarded: *Fournier v Canadian National Rly Co* [1927] AC 167, PC (annuity cannot be awarded); cf *Metcalf v London Passenger Transport Board* [1938] 2 All ER 352, where Macnaghten J would have been prepared to award a pension with the consent of the parties.

2 *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 at 132-133, HL; *Clark v Urquhart* [1930] AC 28 at 54, HL, per Lord Sumner; *Alfred Rowntree & Sons Ltd v Frederick Allen & Sons (Poplar) Ltd* (1935) 41 Com Cas 90. It may sometimes be necessary for the plaintiff to decide under which head he will claim damages: see *Nichrotherm Electrical Co Ltd v Percy* [1957] RPC 207 at 214, CA, per Lord Evershed MR (breach of confidence or infringement of copyright). In exceptional cases, where the basis of assessment proves to be wrong shortly after the trial, the Court of Appeal may give leave to adduce further evidence with a view to reducing or increasing the damages: see *Jenkins v Richard Thomas and Baldwins Ltd* [1966] 2 All ER 15, [1966] 1 WLR 476, CA; *Curwen v James* [1963] 2 All ER 619, [1963] 1 WLR 748, CA; *Mulholland v Mitchell* [1971] AC 666, [1971] 1 All ER 307, HL; *McCann v Sheppard* [1973] 2 All ER 881, [1973] 1 WLR 540, CA; and see *Murphy v Stone Wallwork (Charlton) Ltd* [1969] 2 All ER 949, [1969] 1 WLR 1023, HL, where leave was given to adduce fresh evidence even after the time for appealing had expired.

3 *Gold v Essex County Council* [1942] 2 KB 293 at 304, [1942] 2 All ER 237 at 244, CA, per Lord Greene MR; cf *Heatley v Steel Co of Wales Ltd* [1953] 1 All ER 489 at 491, [1953] 1 WLR 405 at 409, CA, per Lord Goddard CJ (where, in apportioning the damages awarded under the Fatal Accidents Acts (as to which see now the Fatal Accidents Act 1976; para 932 et seq post; and NEGLIGENCE vol 78 (2010) PARAS 24-28) between the widow and the dependant children, the possibility of the awards for minors accumulating was considered).

4 See RSC Ord 29 r 11. Application for interim payment is made under Ord 29 r 10. The same principle applies to proceedings in the county court by virtue of the County Courts Act 1984 s 50; and CCR Ord 13 r 12. Interim payments were introduced in 1970 but were then applicable only to cases of personal injury, where they still remain most common; they may now be obtained on account of any damages. RSC Ord 29 r 12 makes similar provision for sums other than damages, and it does not matter under which rule a claimant proceeds: *Shearson Lehman Bros Inc v MacLaine Watson & Co Ltd* [1987] 2 All ER 181, [1987] 1 WLR 480, CA. See CIVIL PROCEDURE.

5 *Williamson v John I Thorneycroft & Co Ltd* [1940] 2 KB 658, [1940] 4 All ER 61, CA; *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1952] AC 292 at 300, [1952] 1 All ER 20 at 23, HL, per Viscount Jowitt, and at 306 and 27 per Lord Normand; *Hawkins v New Mendip Engineering Ltd* [1966] 3 All ER 228, [1966] 1 WLR 1341, CA (damages allowed for risk of future deterioration of health); *Jones v Griffith* [1969] 2 All ER 1015, [1969] 1 WLR 795, CA. In *Crossgrove v Barkers Traffic Services Ltd* (1966) 110 Sol Jo 892, the assessment of damages was deferred owing to the possibility of deterioration in the injured plaintiff's condition; cf *Murray v Shuter* [1972] 1 Lloyd's Rep 6, CA, where the death of the injured person was expected and the trial was adjourned for seven months, since a claim under the Fatal Accidents Acts would have become available on death. In the event the action was discontinued and a new action started. The injured person did not die within the seven months but did die before the new action was brought to trial and a claim under the Fatal Accidents Acts (as to which see now the Fatal Accidents Act 1976; para 932 et seq; and NEGLIGENCE vol 78 (2010) PARAS 24-28) was added.

6 See generally para 878 et seq post.

7 See the Supreme Court Act 1981 s 32A (added by the Administration of Justice Act 1982 s 6(1)); the County Courts Act 1984 s 51; RSC Ord 37 rr 7-10; CCR Ord 22 r 6A; and PARA 930 post.

8 See the Damages Act 1996 s 2; and PARA 931 post. It is doubtful whether the courts already had this power, but see *Burke v Tower Hamlets Health Authority* (1989) Times, 10 August per Drake J.

9 The Damages Act 1996 ss 4, 5 provide added protection to structured settlements. Structured settlements are not strictly damages: see PARA 931 post.

10 *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 at 144, HL, per Lord Bramwell; and see *Fetter v Beale* (1701) 1 Salk 11. A compromise of a claim for damages may be made subject to the right to sue thereafter if the damages turn out greater than was anticipated: *Lee v Lancashire and Yorkshire Rly Co* (1871) 6 Ch App 527 at 534.

11 *Brunsdon v Humphrey* (1884) 14 QBD 141, CA; applied in *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 at 139, HL, per Lord Blackburn; *Macdougall v Knight* (1890) 25 QBD 1 at 8, CA, per Lord Esher MR; *Furness, Withy & Co Ltd v J & E Hall Ltd* (1909) 25 TLR 233; *Conquer v Boot* [1928] 2 KB 336; cf *Gibbs v Cruikshank* (1873) LR 8 CP 454. See further CIVIL PROCEDURE vol 12 (2009) PARA 1174 et seq.

12 *Brunsdon v Humphrey* (1884) 14 QBD 141, CA; *Lacon v Barnard* (1626) Cro Car 35 (trespass and trover); *Guest v Warren* (1854) 9 Exch 379 (malicious prosecution and false imprisonment); *Gibbs v Cruikshank* (1873) LR 8 CP 454 (replevin and trespass). However, the court has inherent jurisdiction to prevent multiplicity of actions upon the same or closely related facts as being vexatious and an abuse: *Green v Weatherill* [1929] 2 Ch 213 at 221; *Greenhalgh v Mallard* [1947] 2 All ER 255, CA, distinguishing *Brunsdon v Humphrey* supra. *Brunsdon v Humphrey* supra was criticised in *Buckland v Palmer* [1984] 3 All ER 554 at 559, [1984] 1 WLR 1109 at 1116, CA, per Griffiths LJ and was not followed in *Talbot v Berkshire County Council* [1994] QB 290, [1993] 4 All ER 9, CA. There is now doubt as to this proposition. See also CIVIL PROCEDURE.

13 *HE Daniels Ltd v Carmel Exporters and Importers Ltd*[1953] 2 QB 242, [1953] 2 All ER 401.

14 *Henderson v Henderson* (1843) 3 Hare 100; *Talbot v Berkshire County Council* [1994] QB 290, [1993] 4 All ER 9, CA. The rule in *Henderson v Henderson* supra applies equally to industrial tribunal proceedings: *Divine-Bortey v Brent London Borough Council* (1998) 22 LS Gaz R 29 (applicant could not bring separate proceedings for racial discrimination after losing his unfair dismissal case). As to abuse of process see CIVIL PROCEDURE.

## UPDATE

### 826-850 General Rules on Assessment of Damages

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 833 Damages assessed once and for all

NOTE 4--As to the award of interest on an interim payment, see *Kuwait Airways Corp v Kuwait Insurance Co SAK (No 2)*[2000] 1 All ER (Comm) 972.

NOTE 7--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 14--An action under the Civil Liability (Contribution) Act 1978 s 3 (see PARA 838) may fall foul of the rule in *Henderson*, cited: *Morris v Wentworth-Stanley* [1999] 2 WLR 470, CA. On an assessment of damages any point going to quantification of damage may be raised by a defendant provided that it is not inconsistent with any issue settled by the judgment: *Lunnun v Singh*(1999) Times, 19 July, CA, applied in *Pugh v Cantor Fitzgerald International*[2001] All ER (D) 67 (Mar), CA (decided under the CPR).



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(iv) Continuing Wrongs/834. In general.

#### (iv) Continuing Wrongs

##### 834. In general.

A cause of action in respect of which a plaintiff is entitled and is required to have the prospective damages assessed must be distinguished from a continuing cause of action, namely a cause of action which arises from the repetition or continuance of acts or omissions of the same kind as that for which an action has already been brought<sup>1</sup>. The distinction is important in determining whether a matter is *res judicata* and whether a limitation period has expired. Thus where a trespass continues, a fresh cause of action arises every day during which the trespass continues<sup>2</sup>, and prospective damages, if any, can be recovered in each new action. Similarly, where it is the damage consequent on an act or omission rather than the act or omission itself which provides the cause of action, as for example in nuisance, then, as the action is maintainable only in respect of the damage or is not maintainable until the damage is sustained<sup>3</sup>, a fresh action will lie every time damage accrues from the act<sup>4</sup>. In this case, however, prospective damages are not recoverable, for the cause of action is not the act but the damage arising from it<sup>5</sup>. A continuing cause of action is not constituted by repeated breaches of a continuing obligation<sup>6</sup> as, for instance, in an instalment contract<sup>7</sup>. Prospective damages can be awarded in lieu of an injunction in the case of a threatened injury by virtue of the Supreme Court Act 1981<sup>8</sup>, but if equitable damages are awarded for such prospective claims then no further action can be brought since the plaintiff will have been already compensated<sup>9</sup>. In cases of continuing actionable nuisance the jurisdiction to award damages, rather than to give the injunction sought, ought to be exercised only under very exceptional circumstances<sup>10</sup>.

Where damages are to be assessed in respect of a continuing cause of action they are to be assessed up to the time of the assessment. If it were not for this provision in the rules of court<sup>11</sup>, they would at common law be assessable only up to the time of the issue of the writ and it would not be possible to bring a second action in respect of damage appearing between the issue of process and judgment<sup>12</sup>. In some cases where the injury caused is of a continuous nature it may be impossible to measure the damages occasioned with any certainty: in these circumstances an injunction will be granted rather than damages awarded in lieu<sup>13</sup>.

1 *Hole v Chard Union* [1894] 1 Ch 293 at 295, CA, per Lindley LJ; cf *Hole v Chard Union* supra at 296 per AL Smith LJ; see also *Baker v Bache* (1725) 2 Ld Raym 1382; *Holmes v Wilson* (1839) 10 Ad & El 503; *Battishill v Reed* (1856) 18 CB 696; *Coward v Gregory* (1866) LR 2 CP 153; *Crumbie v Wallsend Local Board* [1891] 1 QB 503, CA; *Cameron-Head v Cameron & Co* 1919 SC 627, where the pursuer obtained a declarator that (liquidated) damages accrued *de diem in diem* for breach of contract to clear away timber, though she recovered to the date of the writ.

2 *Thompson v Gibson* (1841) 7 M & W 456; *Konskier v B Goodman Ltd* [1928] 1 KB 421, CA.

3 *Whitehouse v Fellowes* (1861) 10 CBNS 765 (a cause of action in trespass arises on the doing of the act, but in nuisance the cause of action arises when injury is sustained). In negligence, the normal rule is that the action similarly accrues when damage is sustained and not when it becomes apparent: *Archer v Catton & Co Ltd* [1954] 1 All ER 896, [1954] 1 WLR 775; *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, [1963] 1 All ER 341, HL; *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1, [1983] 1 All ER 65, HL; but see now *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305, [1997] 1 WLR 1627, HL. In contract, the cause of action arises at the time of the breach: *Howell v Young* (1826) 5 B & C 259 (assumpsit against solicitor). There has been statutory intervention to alter the effect of the above decisions as to when the actions become time-barred: see the Limitation Act 1980 s 11 (as amended) (in cases of personal injury time

runs from the date of the plaintiff's knowledge if that date is later than the date on which the cause of action accrued); s 32 (as amended) (postponement of limitation period in case of fraud, concealment or mistake); ss 32A, 33 (as respectively added and amended) (discretion to exclude the time limits in personal injury and defamation cases); ss 14A, 14B (both as added) (other latent damage); and generally LIMITATION PERIODS.

Negligent professionals can now be sued in tort (cf *Howell v Young* supra) so as to take advantage of a later limitation date, but see *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305 at 311, [1997] 1 WLR 1627 at 1633, HL, per Lord Nicholls: 'the disparity between the time when these parallel causes of action arise in contract and tort should be smaller, rather than greater'.

4 *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 at 145, HL, per Lord Bramwell; *Backhouse v Bonomi* (1861) 9 HL Cas 503; cf *Thompson v Gibson* (1841) 7 M & W 456; *Shadwell v Hutchinson* (1831) 4 C & P 333; *Crumbie v Wallsend Local Board* [1891] 1 QB 503, CA.

5 *West Leigh Colliery Co Ltd v Tunnicliff and Hampson Ltd* [1908] AC 27, HL; *Midland Bank plc v Bardgrove Property Services Ltd* (1992) 65 P & CR 153, 60 BLR 1, CA (no cause of action in effecting remedial works to prevent anticipated physical damage resulting from interference with right of support to land). This principle prevents the depreciation in the market value of the property due to the risk of future subsidence being taken into consideration in the assessment of damages for subsidence caused by working minerals under it. The authorities relating to subsidence were extensively reviewed in *Midland Bank plc v Bardgrove Property Services Ltd* supra.

6 *National Coal Board v Galley* [1958] 1 All ER 91, [1958] 1 WLR 16, CA (refusal to work on Saturdays was a repeated breach) distinguishing *Hole v Chard Union* [1894] 1 Ch 293, CA (sewage polluting stream).

7 *National Coal Board v Galley* [1958] 1 All ER 91, [1958] 1 WLR 16, CA.

8 *Le* by virtue of the Supreme Court Act 1981 s 50; and see *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851 at 857, HL, per Viscount Finlay. See further CIVIL PROCEDURE vol 11 (2009) PARA 364 et seq.

9 *Jaggard v Sawyer* [1995] 2 All ER 189 at 201, [1995] 1 WLR 269 at 280-281, CA, per Bingham MR, and at 206 and 286 per Millett LJ.

10 *Kennaway v Thompson* [1981] QB 88, [1980] 3 All ER 329, CA (the public interest in continuing the nuisance did not prevail over private interest in obtaining an injunction; *Miller v Jackson* [1977] QB 966, [1977] 3 All ER 338, CA, not binding).

11 *Le* in RSC Ord 37 r 6; and see *Hole v Chard Union* [1894] 1 Ch 293, CA.

12 *Fetter v Beale* (1701) 1 Salk 11; 91 ER 11; *Cameron-Head v Cameron & Co* 1919 SC 627. As to claiming interest on damages see PARA 848 et seq post.

13 *Le* by virtue of the Supreme Court Act 1981 s 50; and see *Wood v Conway Corp* [1914] 2 Ch 47, CA; and CIVIL PROCEDURE vol 11 (2009) PARA 356 et seq.

## UPDATE

### 826-850 General Rules on Assessment of Damages

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 834 In general

TEXT AND NOTES 8, 13--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(v) Unlawful Acts and Illegal Contracts/835. Relief affected by plaintiff's unlawful act; in general.

## **(v) Unlawful Acts and Illegal Contracts**

### **835. Relief affected by plaintiff's unlawful act; in general.**

The courts will not lend their aid to a litigant so as to enable him, his representative or beneficiary, to obtain a benefit from his own crime or reparation for the consequences of his own culpable criminal act. Damages, or other moneys, are not usually recoverable where the breach of duty in respect of which an action is brought arises out of an illegal transaction or other unlawful act or activity. The reason for this principle, traditionally expressed by the maxim *ex turpi causa non oritur actio*<sup>1</sup>, is public policy, but other aspects of public policy may conflict, in which case a balance must be struck with, for example, the principle of *pacta sunt servanda*<sup>2</sup> or the public policy objective that victims of road accidents should be guaranteed compensation. Actions which are no longer criminal may still be contrary to public policy<sup>3</sup>, whereas many regulatory offences are not reprehensible<sup>4</sup>. The corollary of the *ex turpi* maxim is in *pari delicto potior est conditio defendentis*<sup>5</sup>; but injustice may result from merely allowing the loss to lie where it falls, and the court has been driven to evaluate the relative culpability of the parties to an action<sup>6</sup>. Public policy is not static. The courts have tended to enforce existing proprietary rights in spite of incidental illegality<sup>7</sup>.

Conflict has arisen in the context of claims to administer or benefit from the estate of a deceased person<sup>8</sup>, life insurance<sup>9</sup>, motor insurance<sup>10</sup>, insurance of goods<sup>11</sup>, indemnity insurance<sup>12</sup>, claims for specific performance or declarations<sup>13</sup> and claims for ancillary relief<sup>14</sup>. Traders have sued for the price of goods<sup>15</sup> and plaintiffs sought restitution of money or property<sup>16</sup> where the underlying contract is tainted with illegality. However, none of these is a claim for damages<sup>17</sup> and they are thus not properly the subject of this title. Claims to recover property, though not money, do have relevance to damages, since the relevant cause of action is the tort of conversion<sup>18</sup>.

1 'No right of action arises from a shameful cause'.

2 'Agreements should be performed'.

3 Suicide was abolished as a crime by the Suicide Act 1961 s 1, but by virtue of s 2(1) aiding and abetting suicide remains a crime: see *Dunbar v Plant* [1997] 4 All ER 289, [1997] 3 WLR 1336, CA. Maintenance and champerty were abolished as torts and crimes by the Criminal Law Act 1967 ss 13(1), 14(1), but agreements to maintain an action are still illegal; as to maintenance see generally CONTRACT vol 9(1) (Reissue) PARAS 850-855; but note the effect of the Courts and Legal Services Act 1990 s 58 (conditional fees); and see LEGAL PROFESSIONS vol 66 (2009) PARA 953. See also *Thai Trading Co (a firm) v Taylor* [1998] 3 All ER 65, CA.

4 In *Beresford v Royal Insurance Co Ltd* [1937] 2 KB 197 at 200, [1937] 2 All ER 243 at 254, CA, Lord Wright MR observed that there were statutory offences and crimes of inadvertence where the application of the maxim *ex turpi causa non oritur actio* lacked moral justification. 'There are cases nowadays where a man can be guilty of a crime without any moral culpability at all': *Marles v Philip Trant & Sons Ltd (No 2), (Mackinnon)* [1954] 1 QB 29 at 39, [1953] 1 All ER 651 at 659, CA, per Denning LJ.

5 'Where the parties are equally in the wrong, the defence is in the stronger position'.

6 *Saunders v Edwards* [1987] 2 All ER 651, [1987] 1 WLR 1116, CA (damages recovered on account of seller's misrepresentations notwithstanding plaintiff's participation in stamp duty evasion). The notion of relative culpability was disapproved of in *Pitts v Hunt* [1990] 3 All ER 344 at 362-363, [1990] RTR 290 at 309-311, CA per Dillon LJ in favour of a distinction between cases where the claim arises directly *ex turpi* and those where the unlawful conduct is merely incidental.

7 *Bowmaker Ltd v Barnet Instruments Ltd* [1945] KB 65, [1944] 2 All ER 579; *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL.

8 *Re Crippen's Estate* [1911] P 108 (murderer's executrix not granted administration of the estate of his murdered wife); *Re Hall's Estate, Hall v Knight and Baxter* [1914] P 1, CA (legatee convicted of manslaughter of testator could not take under will or obtain probate). See now, however, the Forfeiture Act 1982 s 2, whereby the court has power to modify the effect of the common law rule whereby a person who has unlawfully killed another cannot benefit from his death in appropriate cases of manslaughter, though not murder (the 'forfeiture rule': see s 1). As to the forfeiture rule in relation to social security benefits see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 81.

9 *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 156, CA, per Fry LJ (trust of proceeds of policy in favour of murderess failed and proceeds became part of victim's estate); *Beresford v Royal Insurance Co Ltd* [1937] 2 KB 197, [1937] 2 All ER 243, CA (affd [1937] AC 586, [1938] 2 All ER 502, HL) (life insurance policy unenforceable by personal representative of suicide); *Davitt v Titcomb* [1990] Ch 110 (defendant barred from claiming under endowment policy on the lives of himself and the person he murdered); cf *Dunbar v Plant* [1997] 4 All ER 289, [1997] 3 WLR 1336, where by virtue of the Forfeiture Act 1982 the survivor of a suicide pact obtained modification of the forfeiture rule.

10 A policy is enforceable when a claim for indemnity by the insured arises out of an act which led to his conviction for manslaughter: *Tinline v White Cross Insurance* [1921] 3 KB 327; *James v British General Insurance Co Ltd* [1927] 2 KB 311. An injured third party may recover from the Motor Insurers' Bureau even when his injuries are the result of a wilful criminal act on the part of an uninsured driver: *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, [1964] 2 All ER 742, CA.

11 *Geismar v Sun Alliance and London Insurance Ltd* [1978] QB 383, [1977] 3 All ER 570 (plaintiff could not claim on insurance policy in respect of theft of goods on which he had not paid customs duty); *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, [1988] 2 All ER 23, CA (similar case involving loss of diamonds sent abroad with invoice understating their value in order to avoid German customs duty).

12 *Haseldine v Hosken* [1933] 1 KB 822, CA (solicitor not permitted to recover for loss arising from a champertous agreement). Conditional fee agreements with solicitors are, however, no longer champertous: see the Courts and Legal Services Act 1990 s 58; and LEGAL PROFESSIONS vol 66 (2009) PARA 953. See also *Thai Trading Co (a firm) v Taylor* [1998] 3 All ER 65, CA; and CONTRACT vol 9(1) (Reissue) PARA 852.

See also *Gray v Barr, Prudential Insurance Co Ltd* [1971] 2 QB 554, [1971] 2 All ER 949, CA (deceased killed when gun went off whilst defendant was threatening unlawful violence; defendant acquitted but could not claim under his indemnity insurance policy in action brought by widow of victim). As to indemnity insurance see generally INSURANCE.

13 *Muckleston v Brown* (1801) 6 Ves 52, where the court refused to enforce a secret trust designed to evade the Statute of Frauds (1677); cf *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL, where the plaintiff was allowed to assert a proprietary interest notwithstanding that interest was kept secret in order to defraud the Department of Social Security.

14 *Whiston v Whiston* [1995] 2 FLR 268, [1998] 1 All ER 423, CA (crime of bigamy disentitled wife to relief); *S-T v J* [1998] 1 All ER 431, CA (perjury by transsexual barred entitlement to ancillary relief). As to ancillary relief under the Matrimonial Causes 1973 see generally MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

15 *Langton v Hughes* (1913) 1 M & S 593 at 596 per Lord Ellenborough CJ, who said that what is done in contravention of an Act of Parliament cannot be made the subject of an action; *Anderson Ltd v Daniel* [1924] 1 KB 138, CA (statutory invoice not provided); *B and B Viennese Fashions v Losane* [1952] 1 All ER 909, CA (statutory invoice not provided).

16 *Bigos v Bousted* [1951] 1 All ER 92 (share certificate handed over, fruitlessly, to obtain lira in contravention of foreign exchange regulations then in force).

17 See generally CONTRACT; EXECUTORS AND ADMINISTRATORS; INSURANCE.

18 *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65; *Thackwell v Barclays Bank plc* [1986] 1 All ER 676.

English law does not have a *vindicatio* action, an action in rem, whereby title to property can be asserted directly. However, the court has a discretion whether to order delivery up of the goods, to award damages, or both, or even to give the defendant a choice by virtue of the Torts (Interference with Goods) Act 1977 s 3; conversion must now do duty for detinue which was abolished by s 2. See generally TORT.

## UPDATE

## **826-850 General Rules on Assessment of Damages**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **835 Relief affected by plaintiff's unlawful act; in general**

NOTES--When considering whether to deny a claim for damages on the grounds of public policy the test to be applied is whether the claim, or relevant part, is based substantially and not collaterally on an unlawful act: *Hewison v Meridian Shipping Services PTE Ltd*[2002] EWCA Civ 1821, [2003] ICR 766. As to where an employer brings proceedings against an employee who has committed an illegal act in the course of his employment see *Safeway Stores Ltd v Twigger*[2010] EWHC 11 (Comm), [2010] All ER (D) 90 (Jan).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(v) Unlawful Acts and Illegal Contracts/836. Contract and tort damages affected by illegality.

### **836. Contract and tort damages affected by illegality.**

In general, a claim cannot be grounded on a contract which was either illegal at the time of its formation<sup>1</sup>, or became tainted with illegality in its performance<sup>2</sup>. Such a contract is unenforceable by the guilty party; but in certain circumstances an innocent party may obtain a remedy and preclude the party in breach from invoking his own illegal conduct by way of defence<sup>3</sup>. A contract may remain untainted with illegality but it may still be contrary to public policy to enforce it<sup>4</sup>.

No claim may normally be brought for injury or loss arising in the course of, or as a consequence of, the plaintiff's illegal or criminal conduct<sup>5</sup>, unless the claimant was unaware of the legal character of his own conduct<sup>6</sup>. Recovery is not barred when the cause of action arose before a suicide, or a spouse claims in her own right<sup>7</sup>. The touchstone, in contract or tort claims, is whether the plaintiff can make out his claim without relying upon his own illegal or criminal act<sup>8</sup>. A statutory offence may be ignored if the public conscience would not be affronted by the illegality<sup>9</sup>, but the House of Lords has held that such a 'public conscience test' has no place in determining rights created by illegal transactions<sup>10</sup>. Damages awarded to a plaintiff engaged in a wrongful activity, eg breach of statutory duty designed for his own protection, may be reduced on the grounds of contributory negligence even though the *ex turpi maxim* is not applied<sup>11</sup>.

Where, owing to the wrong of another, a person is prosecuted for a criminal offence, he may incur loss in the cost of defending the charge, by the imposition of a fine, through imprisonment or through damage to his reputation. Where this loss would be recoverable according to the usual principles of the measure of damages, it is a matter of public policy whether the plaintiff's own involvement in the offence debars him from recovery, especially of any fine<sup>12</sup>. A defendant whose criminality has caused loss to the plaintiff may not be able to recover his costs of a successful defence<sup>13</sup>.

1 *Webster v de Tastet* (1797) 7 Term Rep 157 (a damages claim against agent for not procuring illegal insurance contract).

2 *Anderson Ltd v Daniel* [1924] 1 KB 138 at 149, CA, per Lord Atkin; *B and B Viennese Fashions v Losane* [1952] 1 All ER 909, CA; *Marles v Philip Trant & Sons Ltd (No 2), (Mackinnon)* [1954] 1 QB 29, [1953] 1 All ER 651, CA (third party wholesaler liable to retailer defendants though latter had performed their contract with plaintiff illegally): *Anderson Ltd v Daniel* supra and *B and B Viennese Fashions v Losane* supra distinguished.

As to void and illegal contracts see generally CONTRACT vol 9(1) (Reissue) PARA 836 et seq.

3 *Fielding and Platt Ltd v Najjar* [1969] 2 All ER 150, [1969] 1 WLR 375, CA (defendant had asked plaintiff to supply false invoice to deceive Lebanese customs).

4 *Geismar v Sun Alliance and London Insurance Ltd* [1978] QB 383, [1977] 3 All ER 570 (no recovery on insurance of uncustomed goods which were later stolen (not a damages claim)).

5 See *Burns v Edman* [1970] 2 QB 541, [1970] 1 All ER 886 (a claim under the Fatal Accidents Acts (see now the Fatal Accidents Act 1976; para 932 et seq post; and NEGLIGENCE vol 78 (2010) PARAS 24-28) failed on the ground that the deceased supported his family from the proceeds of crime); *Hyde v Tameside Area Health Authority* (1981) Times, 16 April, unreported (the plaintiff, who was paralysed as a result of attempted suicide in hospital, failed to recover (negligence was made out)); *Meah v McCreaner (No 2)* [1986] 1 All ER 943 (injury caused by defendant's negligence led to personality change and plaintiff attacked women; plaintiff could not recover from the defendant damages awarded to his victims). In *Thackwell v Barclays Bank plc* [1986] 1 All ER 676 the plaintiff, involved in fraudulent dealings, was not entitled to recover in conversion against the bank in

respect of cheque negligently credited to third party's account (reasoning disapproved of in *Pitts v Hunt* [1991] 1 QB 24, [1990] 3 All ER 344, where no duty of care was owed by motor-cycle rider to reckless pillion passenger whose claim arose directly out of his participation in serious offences).

6 *Burrows v Rhodes* [1899] 1 QB 816 (action lay by plaintiff who suffered loss and injury in the course of attacking a friendly country owing to misrepresentations of defendant).

7 *Pigney v Pointers Transport Services Ltd* [1957] 2 All ER 807, [1957] 1 WLR 1121 (suicide brought about by depression caused by the defendant's tort did not bar continuation of his action by the deceased's widow or a claim by her under the fatal accidents legislation since no benefit would accrue to the suicide's estate in the latter action); *Kirkham v Chief Constable of Greater Manchester Police* [1990] 2 QB 283, [1990] 3 All ER 246, CA, where a widow recovered under the fatal accidents legislation on account of her suicidal husband's death whilst in police custody (negligence was made out). As to claims under the Fatal Accidents Act 1976 see PARA 932 et seq post; and NEGLIGENCE vol 78 (2010) PARAS 24-28.

8 *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65, [1944] 2 All ER 579 (plaintiffs recovered damages since they were able to rely upon their title to property rather than the illegal contract under which they had transferred possession to defendants); *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL (plaintiff able to rely on equitable title in spite of fact that house was transferred into defendant's name to defraud Department of Social Security); *Marles v Philip Trant & Sons Ltd (No 2), (Mackinnon)* [1954] 1 QB 29, [1953] 1 All ER 651, CA (plaintiff's loss stemmed from third party's supplying wrong seed and this was unaffected by plaintiff's failure to provide statutory invoice to its own customer); *Pye Ltd v BG Transport Service Ltd* [1966] 2 Lloyd's Rep 300 (claim for lost goods against carriers succeeded although plaintiff had supplied a false invoice to deceive Iranian customs); *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, [1988] 2 All ER 23, CA (plaintiff recovered from insurers although they had falsely represented the value of goods on invoice).

9 *Howard v Shirlstar Container Transport Ltd* [1990] 3 All ER 366, [1990] 1 WLR 1292, CA (plaintiff breached Nigerian air traffic control regulations to save his life and in the course of carrying out his contract with the defendant).

10 *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL (not a damages claim).

11 *National Coal Board v England* [1954] AC 403, [1954] 1 All ER 546, HL (plaintiff had breached statutory duty); *Revill v Newbery* [1996] QB 567, [1996] 1 All ER 291, CA (plaintiff trespasser engaged in criminal activity shot by defendant occupier).

12 As to public policy and the recoverability of fines and costs as damages see PARA 832 ante and the cases cited therein.

13 See *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35 at 39 per Denning J ('But I shall not give the defendants any costs. They, too, will not get any assistance from this court').

## UPDATE

### 826-850 General Rules on Assessment of Damages

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 836 Contract and tort damages affected by illegality

NOTE 5--See *Cross v Kirkby* (2000) Times, 5 April, CA (claimant barred from claiming damages for personal injury inflicted during attempt to disrupt fox hunt). See *Hewison v Meridian Shipping Services PTE Ltd*; and PARA 835 (crane operator on board ship; failure to disclose epilepsy; not entitled to damages for loss of future earnings).

NOTE 12--See *Gray v Thames Trains* [2009] UKHL 33, [2009] 1 AC 1339, [2009] 4 All ER 81 (claimant who suffered depression caused by defendant's negligence, and who committed manslaughter as a result, could not recover damages for loss of earnings after the killing).

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## (vi) Contribution

### 837. Contribution and apportionment.

Where, in a contract or tort action, a plaintiff sues two or more defendants who are liable in respect of the same damage, the plaintiff will be awarded his entire damages against each defendant<sup>1</sup>. Although the court has the power to apportion the damages as between the defendants, and frequently does so, it has no power to apportion them as against the plaintiff, even though the defendants sever their defences and plead several pleas<sup>2</sup> and even though their culpability may vary<sup>3</sup>. If, of course, the defendants have caused different damage to the plaintiff, damages will be awarded against each defendant only in respect of the damage for which he is responsible<sup>4</sup>. Where in tort, exemplary<sup>5</sup> or, it seems, aggravated, damages<sup>6</sup> are claimed against tortfeasors who are liable in respect of the same damage, those damages must be assessed by reference to the conduct of the least guilty defendant which may totally exclude such an award<sup>7</sup>.

Where a plaintiff, through contributory negligence, is partly responsible for the damage, the apportionment of liability between the plaintiff and defendants is a separate and prior issue for determination from the issue of apportionment or contribution between the defendants<sup>8</sup>. Claims for contribution between those persons liable, whether they were sued as defendants or not, are governed by statute<sup>9</sup>. The statutory right to recover contribution supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under the Civil Liability (Contribution) Act 1978 in corresponding circumstances<sup>10</sup>. However, nothing in that Act affects any express or implied contractual or other right to indemnity, or any express contractual provision regulating or excluding contribution, which would be enforceable apart from the statute, or renders enforceable any agreement for indemnity or contribution which would not be enforceable apart from the statute<sup>11</sup>. The Civil Liability (Contribution) Act 1978 deals only with contribution claims in respect of damages and not with claims in respect of debts<sup>12</sup>. Moreover the statute's ambit is damage, that is the wrong causing the injury or loss, and not the damages the victim might recover<sup>13</sup>.

1 *London Association for the Protection of Trade v Greenlands Ltd*[1916] 2 AC 15 at 31, HL, per Lord Atkinson; *Cassell & Co Ltd v Broome*[1972] AC 1027 at 1063, [1972] 1 All ER 801 at 817, HL, per Lord Hailsham LC; *Fitzgerald v Lane*[1989] AC 328 at 339, 344, [1988] 2 All ER 961 at 965, 969, HL, per Lord Ackner. See also *Egger v Viscount Chelmsford*[1965] 1 QB 248, [1964] 3 All ER 406, CA. However, the plaintiff cannot recover more than he or she has suffered so that if the plaintiff recovers in full from one defendant he must give credit for that amount as against another defendant: see *Townsend v Stone Toms & Partners*[1981] 2 All ER 690, [1991] 1 WLR 1153, CA. If a plaintiff settles with one defendant then before giving credit for that amount to a second defendant, the plaintiff may deduct from the settled amount the costs of the action against the first defendant: *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd (No 2)*[1988] 2 All ER 880.

2 *Heydon's Case* (1612) 11 Co Rep 5a; *Austen v Willward* (1601) Cro Eliz 860; *Crane and Hill v Hummerstone* (1606) Cro Jac 118; *Cocke v Jennor* (1614) Hob 66; *Matthews v Coal* (1615) Cro Jac 384; *Greenlands Ltd v Wilmshurst and London Association for the Protection of Trade*[1913] 3 KB 507 at 528, CA, per Vaughan Williams LJ (revsd on other grounds sub nom *London Association for the Protection of Trade v Greenlands Ltd*[1916] 2 AC 15, HL).

3 *Eliot v Allen* (1845) 1 CB 18; *Clark v Newsam*(1847) 1 Exch 131. If a jury apportions the damages, judgment for the plaintiff cannot be entered in the amounts so apportioned: see *Dawson v M'Clelland*[1899] 2 IR 486, CA; *Damiens v Modern Society Ltd* (1910) 27 TLR 164; *Chapman v Lord Ellesmere*[1932] 2 KB 431 at 471, CA.



4 *Performance Cars Ltd v Abraham*[1962] 1 QB 33, [1961] 3 All ER 413, CA; *Baker v Willoughby*[1970] AC 467, [1969] 3 All ER 1528, HL.

5 See PARA 1115 et seq post.

6 See PARA 1111 et seq post.

7 *Cassell & Co Ltd v Broome*[1972] AC 1027 at 1063, [1972] 1 All ER 801 at 817, HL, per Lord Hailsham LC, at 1089 and 840 per Lord Reid, at 1096 and 845 per Lord Morris, and at 1105 and 852 per Lord Dilhorne.

8 *Fitzgerald v Lane*[1989] AC 328 at 339, [1988] 2 All ER 961 at 965, HL, per Lord Ackner. See also *Saipern SpA and Conoco (UK) Ltd v Dredging VO2 BV and Geosite Surveys Ltd, The Volvox Hollandia (No 2)* [1993] 2 Lloyd's Rep 315.

9 See the Civil Liability (Contribution) Act 1978. This Act, subject to some modifications, gives effect to the Law Commission's *Report on Contribution* (Law Com no 59) (1975) and replaces and extends the field of operation of the Law Reform (Married Women and Tortfeasors) Act 1935 s 6(1) (repealed) which in turn had abrogated the rule in *Merryweather v Nixon* (1799) 8 Term Rep 186, which rule prevented contribution between tortfeasors. The Civil Liability (Contribution) Act 1978 does not apply to contribution claims in which the Convention on the Contract for the International Carriage of Goods by Road (signed at Geneva, 19 May 1956) applies: see the Carriage of Goods by Road Act 1965 s 5(1) (amended by the Civil Liability (Contribution) Act 1978 s 9(1), Sch 1 para 7); and CARRIAGE AND CARRIERS vol 7 (2008) PARA 680. Nothing in the Civil Liability (Contribution) Act 1978 affects any case where the debt in question became due or, as the case may be, the damage in question occurred before 1 January 1979: see ss 7(1), 10(2).

Without prejudice to the Crown Proceedings Act 1947 s 4(1) (indemnity and contribution: see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 182), the Civil Liability (Contribution) Act 1978 binds the Crown; but nothing in the 1978 Act is to be construed as in any way affecting Her Majesty in her private capacity (including in right of the Duchy of Lancaster) or the Duchy of Cornwall: s 5.

10 Ibid s 7(3).

11 Ibid s 7(3). A right to indemnity may arise by express or implied contract: see eg *Arthur White (Contractors) Ltd v Tarmac Civil Engineering Ltd*[1967] 3 All ER 586, [1967] 1 WLR 1508, HL. Furthermore, one tortfeasor may be able to recover his or her contribution from another tortfeasor as damages for breach of contract: *Sims v Foster Wheeler Ltd*[1966] 2 All ER 313, [1966] 1 WLR 769, CA; *Driver v William Willett (Contractors) Ltd*[1969] 1 All ER 665; *Hadley v Droitwich Construction Co Ltd (Joseph Pugsley & Sons Ltd)*[1967] 3 All ER 911, [1968] 1 WLR 37, CA; *Lambert v Lewis*[1982] AC 225, [1981] 1 All ER 1185, HL. A right to indemnity may also arise by statute (see eg the Partnership Act 1890 s 24(2); and PARTNERSHIP vol 79 (2008) PARA 138; the Trustee Act 1925 s 62 (as amended); and TRUSTS vol 48 (2007 Reissue) PARA 1131) or by law from the relationship of the parties (see eg *Eastern Shipping Co Ltd v Quah Beng Kee*[1924] AC 177, PC).

12 In respect of debts see *Lowe v Dixon*(1885) 16 QBD 455; *Hitchman v Stewart* (1855) 3 Drew 271.

13 *Jameson v Central Electricity Generating Board (Babcock Energy Ltd)*[1998] QB 323, [1997] 4 All ER 38, CA.

## UPDATE

### 826-850 General Rules on Assessment of Damages

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 837 Contribution and apportionment

TEXT AND NOTES 1-3--However, in an exceptional case where several tortfeasors are liable for the same risk to which the claimant was exposed, each tortfeasor is liable only to the extent of his contribution to the risk: see *Barker v Corus (UK) Ltd; Murray v British Shipbuilders (Hydrodynamics) Ltd; Patterson v Smiths Dock Ltd*[2006] UKHL 20, [2006] 2 AC 572; and NEGLIGENCE vol 78 (2010) PARA 83.

NOTE 2--See *Jones v Wilkins* [2001] RTR 283, CA (apportionment of liability between defendants for injuries to child passenger not properly secured in a motor car); and *Stimpson v Curran* [2004] EWCA Civ 1249, [2004] All ER (D) 191 (Sep) (apportionment of liability between defendant whose failure to fit a tyre correctly had caused its partial deflation and defendant who had supplied the vehicle without ensuring that its tyres had been properly inflated).

NOTE 4--A defendant will be liable for the whole damage inflicted by him, and the subsequent negligence of a second tortfeasor does not automatically extinguish the causative potency of his own: *Rahman v Arearose Ltd* [2000] 3 WLR 1184, CA (the psychiatric harm caused by the first and second defendants was distinct and not the same damage).

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### **838. Contribution between persons jointly liable.**

A judgment recovered against any person liable in respect of any debt or damage is not a bar to an action, or to the continuance of an action<sup>1</sup>, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage<sup>2</sup>. A person is liable in respect of any damage for these purposes if the person who suffered it, or anyone representing his estate or dependants, is entitled to recover compensation from him in respect of that damage, whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise<sup>3</sup>.

This overcomes the rule that in contract, a judgment obtained against one or more but not all persons who are jointly, as distinct from severally or jointly and severally, liable for the same damage generally operates as a bar to a further action against those not sued<sup>4</sup>. The cause of action merges in the judgment. A similar rule once operated in respect of torts so that a judgment against one joint tortfeasor released all the others<sup>5</sup>. The provision does not deal with the effect of a release<sup>6</sup> or covenant not to sue<sup>7</sup>.

1 'Action', except in the Civil Liability (Contribution) Act 1978 s 1(5) (see PARA 843 post), means an action brought in England and Wales: s 6(4). The reference to 'continuance' of an action is to eliminate problems encountered in *Wah Tat Bank Ltd v Chang Cheng Kum* [1975] AC 507, [1975] 2 All ER 257, PC (see also *Bryanston Finance v De Vries* [1975] QB 703, [1975] 2 All ER 609, CA) on the wording of the Law Reform (Married Women and Tortfeasors) Act 1935 s 6 (repealed). A satisfied judgment, except in the case of a foreign judgment, is a bar to further action against other tortfeasors, whether joint or concurrent, who had been liable for the same damage: *Kohnke v Karger* [1951] 2 KB 670, [1951] 2 All ER 179. Damages recovered under the foreign judgment will be offset against any award in this country.

2 Civil Liability (Contribution) Act 1978 s 3. As to costs see s 4; and PARA 847 post.

3 Ibid s 6(1). For these purposes, references to an action brought by or on behalf of the person who suffered any damage include references to an action brought for the benefit of his estate or dependants; and 'dependants' has the same meaning as in the Fatal Accidents Act 1976 (see PARA 932 et seq post; and NEGLIGENCE vol 78 (2010) PARA 27): Civil Liability (Contribution) Act 1978 s 6(2), (3).

4 See *King v Hoare* (1844) 13 M & W 494; *Kendall v Hamilton* (1879) 4 App Cas 504, HL. See also *Bryanston Finance Ltd v De Vries* [1975] QB 703 at 722, [1975] 2 All ER 609 at 618, CA, per Lord Denning MR. The harshness of this rule was alleviated where judgment was entered against one or more of several defendants in default of appearance (see *Practice Direction (Judgment: Foreign Currency) (No 2)* [1977] 1 All ER 544, [1977] 1 WLR 197; RSC Ord 13 rr 1, 2) or in default of defence (Ord 19 rr 2-7). See also Ord 14 r 8.

5 See *Brinsmead v Harrison* (1872) LR 7 CP 547. This rule never applied to independent tortfeasors causing the same damage who were therefore severally but not jointly liable: *The Koursk* [1924] P 140, CA. This rule was abrogated by statute: see now the Civil Liability (Contribution) Act 1978 s 3; and the text to notes 1-2 supra.

6 A release has the effect of releasing others jointly liable: *Cocke v Jenner* (1614) Hob 66; *Nicholson v Revill* (1836) 4 Ad & El 675; *Duck v Mayeu* [1892] 2 QB 511, CA; *Cutler v McPhail* [1962] 2 QB 292, [1962] 2 All ER 474.

7 A covenant not to sue does not release other parties jointly liable: *Hutton v Eyre* (1815) 6 Taunt 289; *Duck v Mayeu* [1892] 2 QB 511, CA; *Apley Estates Co Ltd v De Bernales* [1947] Ch 217, [1947] 1 All ER 213, CA; *Cutler v McPhail* [1962] 2 QB 292, [1962] 2 All ER 474. However, a reservation of rights against others jointly liable may be implied where terms of settlement are agreed between the plaintiff and only some of the defendants. The effect of such a settlement will then be that of a covenant not to sue those defendants who are party to the settlement and not that of a release of the plaintiff's cause of action against others jointly liable: *Gardiner v Moore* [1969] 1 QB 55, [1966] 1 All ER 365.

## **UPDATE**

### **826-850 General Rules on Assessment of Damages**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **838 Contribution between persons jointly liable**

NOTE 2--The 1978 Act s 3 is not intended to interfere with the interest in joint debtors being sued at the same action, nor is it intended to undermine the principle of an accord and satisfaction: *Morris v Wentworth-Stanley* [1999] 2 WLR 470, CA. See also *HM Revenue and Customs v Yousef* [2008] EWHC 423 (Ch), [2008] BPIR 1491.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(vi) Contribution/839. The position of the claimant.

### **839. The position of the claimant.**

By statute, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)<sup>1</sup>. The 'damage' and 'the same damage' which is the subject of the provision is the damage suffered by the person to whom the party seeking contribution is liable<sup>2</sup>. The focus is on 'the same damage' and not the same damages and therefore the mere fact the losses may be derived from the same factual event is not conclusive<sup>3</sup>. Moreover, since it is necessary only for the parties to be liable for the same damage, it is irrelevant whether they are jointly liable. In addition, the actual legal basis for the liability is not relevant and may differ as between the person claiming contribution and the person who is the subject of the claim<sup>4</sup>.

1 Civil Liability (Contribution) Act 1978 s 1(1). The statute creates a cause of action in its own right: *Virgo Steamship Co SA v Skaarup Shipping Corpn, The Kapetan Georgis* [1988] 1 Lloyd's Rep 352, [1988] FTLR 180. A claim will pass to personal representatives even though liability was not established before the death: *Ronex Ltd v John Laing Construction Ltd (Clarke, Nicholls & Marcel (a firm), third parties)* [1983] QB 398, [1982] 3 All ER 961, CA. A 'full and final settlement' with a prospective claimant may bar a claim to contribution (see *O'Boyle v Leiper* (1990) 134 Sol Jo 316, CA); but also see *Jameson v Central Electricity Generating Board (Babcock Energy Ltd)* [1998] QB 323, [1997] 4 All ER 38, CA).

2 *Birse Construction Ltd v Haiste Ltd* [1996] 2 All ER 1, [1996] 1 WLR 675, CA (damage suffered by water authority arising from defects in construction of reservoir was not the same damage suffered by contribution claimant being the financial loss in having to construct second reservoir).

3 See *Friends' Provident Life Office v Hillier Parker May & Rowden (a firm)* [1997] QB 85 at 100, 106, 108, [1995] 4 All ER 260 at 270, 276, 277, CA per Auld LJ; *Birse Construction Ltd v Haiste Ltd* [1996] 2 All ER 1 at 8, [1996] 1 WLR 675 at 682, CA, per Roch LJ; *Jameson v Central Electricity Generating Board (Babcock Energy Ltd)* [1998] QB 323, [1997] 4 All ER 38, CA. See also *Plant Construction plc v Clive Adam Associates* [1997] 86 BLR 119; *Standard Chartered Bank v Pakistan National Shipping Corpn (No 2)* [1998] 1 Lloyd's Rep 684.

4 *Birse Construction Ltd v Haiste Ltd* [1996] 2 All ER 1, [1996] 1 WLR 675, CA; *K v P* [1993] Ch 140, [1993] 1 All ER 521; *Société Commerciale de Réassurance v Eras International Ltd* as reported in [1992] 1 Lloyd's Rep 570 at 600, CA; *Lampitt v Poole Borough Council* [1991] 2 QB 545 at 552, [1990] 2 All ER 887 at 890, CA, per Lord Donaldson of Lymington MR. See also *Friends' Provident Life Office v Hillier Parker May & Rowden (a firm)* [1997] QB 85 at 103, [1995] 4 All ER 260 at 272, CA, per Auld LJ.

## **UPDATE**

### **826-850 General Rules on Assessment of Damages**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **839 The position of the claimant**

NOTE 1--See *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2000] 2 All ER (Comm) 865, CA (time for determining liability is when person entitled to contribution seeks such contribution) (affirmed on different point: *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd (Carillion Construction Ltd, Pt 20 defendants)* [2002] UKHL 17, [2002] 1 All ER (Comm) 918) (contractual scheme governing liability for damages superseded ordinary rules with effect that contribution

could not be sought from contractors)). See also *BRB (Residuary) Ltd v Connex South Eastern Ltd* [2008] EWHC 1172 (QB), [2008] 1 WLR 2867, [2008] All ER (D) 338 (May).

NOTE 2--The test for establishing parties' liability for the same damage is whether one party's payment to the claimant gives rise to a mutual discharge of liabilities: *Hurstwood Developments Ltd v Motor & General & Andersley & Co Insurance Services, H B Boring & Co Ltd (Pt 20 defendants)* [2001] EWCA Civ 1785, [2002] Lloyd's Rep IR 185.

See also *Eastgate Group Ltd v Lindsey Morden Group Inc (Smith & Williamson (a firm), Pt 20 defendant)* [2001] EWCA Civ 1446, [2001] 2 All ER (Comm) 1050 (same damage even though measure of recovery might differ).

NOTE 4--*Friends' Provident*, cited, applied in *Charter plc v City Index Ltd (Gawler, Pt 20 defendant)* [2007] EWCA Civ 1382, [2008] 3 All ER 126. See also *Re International Championship Management Ltd; Cohen v Davis (KS Tan & Co (a firm), Pt 20 defendant)* [2006] EWHC 768 (Ch), [2007] 2 BCLC 274. See also *Nationwide Building Society v Dunlop Haywards (DHL) Ltd* [2009] EWHC 245 (Comm), [2009] 2 All ER (Comm) 715 (defendants liable in deceit and negligence respectively; 'same damage' extended to foreseeable damage, minus reduction on account of any contributory negligence).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(vi) Contribution/840. Relevant liability.

#### **840. Relevant liability.**

A person is liable in respect of any damage for the purposes of the Civil Liability (Contribution) Act 1978 if the person who suffered it (or anyone representing his estate or dependants<sup>1</sup>) is entitled to recover compensation<sup>2</sup> from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)<sup>3</sup>. For the purposes of the entitlement to contribution, references in the statute to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales<sup>4</sup>. The statute is not therefore concerned with the liability of the respondent to the contribution claim but with the liability of the contribution claimant and respondent to the person suffering the damage<sup>5</sup>.

1 For the meaning of 'dependants' see PARA 838 note 3 ante. An action brought by or on behalf of the person who suffered any damage includes an action brought for the benefit of his estate or dependants: see the Civil Liability (Contribution) Act 1978 s 6(2); and PARA 838 note 3 ante.

2 A claim for 'compensation' includes a restitutionary claim: see *Friends' Provident Life Office v Hillier Parker May & Rowden (a firm)* [1997] QB 85, [1995] 4 All ER 260, CA. As to restitutionary claims see generally RESTITUTION.

3 See the Civil Liability (Contribution) Act 1978 s 6(1); and PARA 838 ante.

4 Ibid s 1(6). See *Arab Monetary Fund v Hashim (No 8)* (1993) Times, 17 June (propositions of foreign law which a plaintiff had advanced or would have to advance in order to succeed against a person claiming contribution are not to be regarded as part of the factual basis of the claim against such person). Rights created by the Civil Liability (Contribution) Act 1978 are directed solely towards recovery of contribution in England and Wales and if the action is stayed for the purposes of an arbitration then rights to contribution are extinguished: *Société Commerciale de Réassurance v Eras International Ltd* as reported in [1992] 1 Lloyd's Rep 570 at 609, CA. The fact that a party might be deprived of a right of contribution may be a factor in determining a question of forum non-conveniens: *Société Nationale Industrielle Aeropatielle v Lee Kui Jak* [1987] AC 871, [1987] 3 All ER 510, PC. The defence of *ex turpi causa* cannot be relied upon in defence of a contribution claim: *K v P* [1993] Ch 140, [1993] 1 All ER 521.

5 *RA Lister & Co Ltd v EG Thomson (Shipping) Ltd, The Benarty (No 2)* [1987] 3 All ER 1032 at 1038, [1987] 1 WLR 1614 at 1622 per Hobhouse J. See also *Arab Monetary Fund v Hashim (No 9)* (1994) Times, 11 October.

#### **UPDATE**

#### **826-850 General Rules on Assessment of Damages**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### **840 Relevant liability**

NOTE 3--See *BRB (Residuary) Ltd v Connex South Eastern Ltd* [2008] EWHC 1172 (QB), [2008] 1 WLR 2867, [2008] All ER (D) 338 (May).





Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(vi) Contribution/841. Relevant law.

#### **841. Relevant law.**

Although a claimant will have to be able to bring a respondent procedurally within the jurisdiction of the court to make the respondent subject to a contribution claim, the Civil Liability (Contribution) Act 1978 applies irrespective of whether the liability is procedurally enforceable as a current and subsisting liability. The focus of the statute is on whether the relevant act has the character of a liability at the time damage was suffered by the injured party<sup>1</sup>. In addition, although the law of England and Wales is the system of law primarily applicable under the statute, there is the rider that this is to include the application of the rules of private international law by reference to foreign law<sup>2</sup>. Therefore, although liability before a court in England and Wales is relevant, the actual substantive law the court would apply is not relevant, nor is it relevant whether the liability was incurred in England or Wales<sup>3</sup>. The statute itself founds jurisdiction and creates a cause of action which is not limited to liabilities incurred in England or Wales<sup>4</sup>.

<sup>1</sup> See *RA Lister & Co Ltd v EG Thomson (Shipping) Ltd, The Benarty (No 2)* [1987] 3 All ER 1032 at 1038, [1987] 1 WLR 1614 at 1622 per Hobhouse J; approved in *Virgo Steamship Co SA v Skaarup Shipping Corpn, The Kapetan Georgis* [1988] 1 Lloyd's Rep 352 at 359, [1988] FTLR 180 at 187 per Hirst J. See also *Arab Monetary Fund v Hashim (No 9)* (1994) Times, 11 October.

<sup>2</sup> *Virgo Steamship Co SA v Skaarup Shipping Corpn, The Kapetan Georgis* [1988] 1 Lloyd's Rep 352, [1988] 1 FTLR 180.

<sup>3</sup> *Logan v Uttlesford District Council* [1986] NLJ Rep 541, CA, per Sir John Donaldson MR; approved in *RA Lister & Co Ltd v EG Thomson (Shipping) Ltd, The Benarty (No 2)* [1987] 3 All ER 1032 at 1038, [1987] 1 WLR 1614 at 1622 per Hobhouse J. See also *Virgo Steamship Co SA v Skaarup Shipping Corpn, The Kapetan Georgis* [1988] 1 Lloyd's Rep 352 at 357, [1988] 1 FTLR 180 at 186 per Hirst J; *Arab Monetary Fund v Hashim (No 9)* (1994) Times, 11 October.

<sup>4</sup> *Virgo Steamship Co SA v Skaarup Shipping Corpn, The Kapetan Georgis* [1988] 1 Lloyd's Rep 352, [1988] 1 FTLR 180; *Arab Monetary Fund v Hashim (No 9)* (1994) Times, 11 October.

#### **UPDATE**

#### **826-850 General Rules on Assessment of Damages**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(vi) Contribution/842. Effect of claimant's liability ceasing.

#### **842. Effect of claimant's liability ceasing.**

A person is entitled to recover contribution notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought<sup>1</sup>. This provision covers discharge of liability by payment, that is, compromise as well as the substitution for the original liability of a liability under a judgment<sup>2</sup>. In addition, a person who has agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) is entitled to recover contribution without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established<sup>3</sup>.

1 Civil Liability (Contribution) Act 1978 s 1(2).

2 *Lampitt v Poole Borough Council* [1991] 2 QB 545 at 552, [1990] 2 All ER 887 at 890-891, CA, per Lord Donaldson of Lymington MR.

3 Civil Liability (Contribution) Act 1978 s 1(4). Cf *Stott v West Yorkshire Road Car Co Ltd* [1971] 2 QB 651 at 657, [1971] 3 All ER 534 at 537, CA, per Lord Denning MR; and see *Lampitt v Poole Borough Council* [1991] 2 QB 545 at 552, [1990] 2 All ER 887 at 890-891, CA, per Lord Donaldson of Lymington MR. There is no further assumption that a defence could not have been established. Propositions of foreign law do not form part of the factual basis of the claim: *Arab Monetary Fund v Hashim (No 8)* (1993) Times, 17 June. If a deceased has entered into a full and final settlement with one concurrent tortfeasor this will not release another tortfeasor and bar action by dependants unless the settlement amounted to the satisfaction of the full value of the claim: *Jameson v Central Electricity Generating Board (Babcock Energy Ltd)* [1998] QB 323, [1997] 4 All ER 38, CA.

#### **UPDATE**

#### **826-850 General Rules on Assessment of Damages**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

#### **842 Effect of claimant's liability ceasing**

NOTE 3--See *Baker & Davies plc v Leslie Wilks Associates (a firm)* [2005] EWHC 1179 (TCC), [2005] 3 All ER 603 ('payment' included payment in kind, capable of valuation in monetary terms).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(vi) Contribution/843. The position of the respondent.

### 843. The position of the respondent.

A person is liable to make contribution<sup>1</sup> notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based<sup>2</sup>. A judgment given in any action brought in any part of the United Kingdom<sup>3</sup> by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought is conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought<sup>4</sup>. It follows that no contribution can be claimed against a person who has been held not liable<sup>5</sup>. However, contribution can be claimed against a person if an action against that person has merely been dismissed for want of prosecution<sup>6</sup>. The relevant time to determine the respondent's liability to make contribution is at the time the damage is suffered. The fact that that liability may cease to be enforceable or even to exist after that point is irrelevant unless it ceases for one of the reasons mentioned<sup>7</sup>.

<sup>1</sup> ie by virtue of the Civil Liability (Contribution) Act 1978 s 1(1): see PARA 839 ante.

<sup>2</sup> Ibid s 1(3). Cf *George Wimpey & Co Ltd v British Overseas Airways Corp* [1955] AC 169, [1954] 3 All ER 661, HL. See *Lampitt v Poole Borough Council* [1991] 2 QB 545 at 552, [1990] 2 All ER 887 at 890-891, CA, per Lord Donaldson of Lymington MR. See also *Morgan v Ashmore, Benson, Pease & Co Ltd* [1953] 1 All ER 328, [1953] 1 WLR 418; *Harvey v RG O'Dell Ltd (Galway)* [1958] 2 QB 78, [1958] 1 All ER 657; *Harper v Gray & Walker (a firm)* [1985] 2 All ER 507, [1985] 1 WLR 1196; *Arab Monetary Fund v Hashim (No 9)* (1994) Times, 11 October; *Logan v Uttlesford District Council* [1986] NLJ Rep 541, CA; *Jameson v Central Electricity Generating Board (Babcock Energy Ltd)* [1998] QB 323, [1997] 4 All ER 38, CA.

<sup>3</sup> 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 3.

<sup>4</sup> Civil Liability (Contribution) Act 1978 s 1(5). It has been suggested that this should be limited to judgments on merit to reconcile it with s 1(3): see *RA Lister & Co Ltd v EG Thomson (Shipping) Ltd, The Benarty (No 2)* [1987] 3 All ER 1032, [1987] 1 WLR 1614; *Nottingham Health Authority v Nottingham City Council* [1988] 1 WLR 903 at 906, CA; and see *Hart v Hall and Pickles Ltd* [1969] 1 QB 405, [1968] 3 All ER 291, CA.

<sup>5</sup> *George Wimpey & Co Ltd v British Overseas Airways Corp* [1955] AC 169, [1954] 3 All ER 661, HL; *Nottingham Health Authority v Nottingham City Council* [1988] 1 WLR 903, CA. See also *RA Lister & Co Ltd v EG Thomson (Shipping) Ltd, The Benarty, (No 2)* [1987] 3 All ER 1032 at 1038, [1987] 1 WLR 1614 at 1623 per Hobhouse J; and *Société Commerciale de Réassurance v Eras International Ltd* [1992] 1 Lloyd's Rep 570 at 601, CA; *Harper v Gray & Walker (a firm)* [1985] 2 All ER 507, [1985] 1 WLR 1196.

<sup>6</sup> *Hart v Hall and Pickles Ltd* [1969] 1 QB 405, [1968] 3 All ER 291, CA. See also *RA Lister & Co Ltd v EG Thomson (Shipping) Ltd, The Benarty (No 2)* [1987] 3 All ER 1032 at 1038, [1987] 1 WLR 1614 at 1623 per Hobhouse J.

<sup>7</sup> *RA Lister & Co Ltd v EG Thomson (Shipping) Ltd, The Benarty (No 2)* [1987] 3 All ER 1032 at 1038, [1987] 1 WLR 1614 at 1621 per Hobhouse J; *Guinness plc v CMD Property Developments Ltd* (1995) 46 ConLR 48. See also *Logan v Uttlesford District Council* (1984) 134 NLJ 500; affd [1986] NLJ Rep 541, CA (third party still liable to make contribution to defendant despite liability ceasing due to third party settling claim with plaintiff). See further *Arab Monetary Fund v Hashim (No 8)* (1993) Times, 17 June (where a fact pleaded by way of defence was inconsistent with a fact pleaded in the plaintiff's statement of claim, the court had to assume that the former fact would not have been established; but where the defendant alleged a material fact which was not so inconsistent, the court was not obliged to treat the negation of that fact as forming part of the factual basis of the claim against the defendant).

**UPDATE**

**826-850 General Rules on Assessment of Damages**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(vi) Contribution/844. Assessment of claims.

#### 844. Assessment of claims.

Generally, in any proceedings for contribution<sup>1</sup> the amount of the contribution recoverable from any person is such as may be found by the court to be just and equitable<sup>2</sup> having regard to the extent of that person's responsibility<sup>3</sup> for the damage<sup>4</sup>. The court has power<sup>5</sup> in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person is to amount to a complete indemnity<sup>6</sup>.

<sup>1</sup> le under the Civil Liability (Contribution) Act 1978 s 1 (see PARA 839 et seq ante) and subject to s 1(3) (see PARA 843 ante).

<sup>2</sup> See *Burnham v Boyer and Brown* [1936] 2 All ER 1165; *Croston v Vaughan* [1938] 1 KB 540, [1937] 4 All ER 249, CA; *Daniel v Rickett, Cockerell & Co Ltd and Raymond* [1938] 2 KB 322, [1938] 2 All ER 631; *Smith v Bray* (1939) 56 TLR 200; *Rippon v Port of London Authority and Russell & Co* [1940] 1 KB 858, [1940] 1 All ER 637; *Collins v Hertfordshire Corpn* [1947] KB 598, [1947] 1 All ER 633; *Weaver v Commercial Process Co Ltd* (1947) 63 TLR 466; *Bell v Holmes* [1956] 3 All ER 449, [1956] 1 WLR 1359; *Diboll v City of Newcastle* [1993] PIQR P16, CA; *Arab Monetary Fund v Hashim (No 9)* (1994) Times, 11 October; *Nelhams v Sandwell's Maintenance Ltd and Gillespie (UK) Ltd* [1996] PIQR P52, CA. See also *L v L* (1976) Times, 11 March.

<sup>3</sup> 'Responsibility involves considerations both of blameworthiness and of causative potency): *Madden v Quirk* [1989] 1 WLR 702 at 707, [1989] RTR 304 at 309 per Simon Brown J. 'Responsibility ... has some elasticity of meaning in this context ... [and] ... may or may not, depending on the circumstances, connote some notion of breach of duty or default': *Friends' Provident Life Office v Hillier Parker May & Rowden (a firm)* [1997] QB 85 at 103, [1995] 4 All ER 260 at 273, CA, per Auld LJ. See also *Prekookeanska Plovidba v Felstar Shipping Corpn and Setramar Sri (and STC Scantrade AB), The Carnival* [1994] 2 Lloyd's Rep 14, CA; *Connor and Labrum v Regoczi-Ritzman and HM Rose Co* (1995) 70 P & CR D41; *Diboll v City of Newcastle* [1993] PIQR P16, CA; *Arab Monetary Fund v Hashim (No 9)* (1994) Times, 11 October; *Nelhams v Sandwell's Maintenance Ltd and Gillespie (UK) Ltd* [1996] PIQR P52, CA; *Standard Chartered Bank v Pakistan National Shipping Corpn (No 2)* [1998] 1 Lloyd's Rep 684. See further *Daniel v Rickett, Cockerell & Co Ltd and Raymond* [1938] 2 KB 322, [1938] 2 All ER 631; *Collins v Hertfordshire Corpn* [1947] KB 598, [1947] 1 All ER 633; *Weaver v Commercial Process Co Ltd* (1947) 63 TLR 466; *Randolph v Tuck* [1962] 1 QB 175, [1961] 1 All ER 814; *The Miraflores and The Abadesa* [1967] 1 AC 826, [1967] 1 All ER 672, HL; *Brown v Thompson* [1968] 2 All ER 708, [1968] 1 WLR 1003, CA; *Baker v Willoughby* [1970] AC 467, [1969] 3 All ER 1528, HL.

<sup>4</sup> Civil Liability (Contribution) Act 1978 s 2(1).

<sup>5</sup> le subject to *ibid* s 2(3): see PARA 845 post.

<sup>6</sup> *Ibid* s 2(2). As to complete indemnity see *Ryan v Fildes* [1938] 3 All ER 517; *Jones v Manchester Corpn* [1952] 2 QB 852, [1952] 2 All ER 125, CA; *Harvey v RG O'Dell Ltd* [1958] 2 QB 78, [1958] 1 All ER 657; *Semtex Ltd v Gladstone* [1954] 1 WLR 945, [1954] 2 All ER 206; *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 578-580, [1957] 1 All ER 125 at 134-135, HL, per Viscount Simonds; *Thomas Saunders Partnership v Harvey* (1989) 30 ConLR 103. A person who is only vicariously liable for a negligent act will be allowed a complete indemnity: see *Lister v Romford Ice and Cold Storage Co Ltd* supra. After this case insurers agreed not to enforce the implied indemnity given by an employee in an employment contract against vicarious liability for death or injury to a colleague. As to the terms see *Morris v Ford Motor Co* [1973] QB 792, [1973] 2 All ER 1084, CA, where it was held that in an industrial context the indemnity would be impliedly excluded. See also *The Yasin* [1979] 2 Lloyd's Rep 45, CA. As to indemnity see further *Rippon v Port of London Authority and Russell & Co* [1940] 1 KB 858, [1940] 1 All ER 637; *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149, [1953] 1 All ER 179, CA; *Davie v New Merton Board Mills Ltd* [1959] AC 604, [1959] 1 All ER 346, HL; *Lambert v Lewis* [1982] AC 225, [1980] 1 All ER 978, HL; *Cemp Properties (UK) Ltd v Dentsply Research and Development Corpn* [1989] 37 EG 133; *Diboll v City of Newcastle* [1993] PIQR P16, CA; *Nelhams v Sandwell's Maintenance Ltd & Gillespie (UK) Ltd* [1996] PIQR P52, CA. The Unfair Contract Terms Act 1977 s 4 subjects some contracts of indemnity to a requirement of reasonableness: see *Thompson v T Lohan (Plant Hire) Ltd* [1987] 2 All ER 631, [1987] 1 WLR 649, CA (indemnity not an exclusion clause and so not within the Unfair Contract Terms Act 1977 s 2(1)); and CONTRACT vol 9(1) (Reissue) PARAS 820, 824. The Defamation Act 1952 s 11 provides that an indemnity against liability for defamation is only unlawful if the party indemnified knows that

the material is defamatory: see LIBEL AND SLANDER vol 28 (Reissue) PARA 9. Public policy may bar the enforcement of an indemnity against the consequences of criminal wrongdoing (*Askey v Golden Wine Co Ltd* [1948] 2 All ER 35) and other serious illegality (*Haseldine v Hosken* [1933] 1 KB 822, CA). But see *Tinline v White Cross Insurance Association* [1921] 3 KB 327; *James v British General Insurance Co Ltd* [1927] 2 KB 311 (insurance against motor manslaughter valid before road traffic insurance became compulsory). An indemnity may also be valid when wrongdoing has been induced by fraud: *Burrows v Rhodes* [1899] 1 QB 816 at 829. In apportioning damages the court cannot have regard to the possible liability of a person who is not a party before the court: *Maxfield v Llewellyn* [1961] 3 All ER 95, [1961] 1 WLR 1119, CA.

## UPDATE

### 826-850 General Rules on Assessment of Damages

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 844 Assessment of claims

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 2--In cases where a defendant assigns its contributory claim, it may become impossible later to assess, pursuant to the 1978 Act s 2(1), a just and equitable amount of contribution: *Abbey National plc v Gouldman (t/a David Gouldman & Co) (Matthews & Son (a firm), Pt 20 defendant)* [2003] EWHC 925 (Ch), [2003] 1 WLR 2042.

NOTE 4--There must be some sufficient relationship between non-causative material and the damage in question: *Brian Warwicker Partnership v HOK International Ltd* [2005] EWCA Civ 962, (2005) Times, 19 September.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(vi) Contribution/845. Effect of statutory or agreed limitation.

#### **845. Effect of statutory or agreed limitation.**

Where the damages which have or might have been awarded as a result of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject to:

- 1 (1) any limit imposed by or under any enactment or agreement made before the damage occurred;
- 2 (2) any reduction by virtue of certain statutory provisions<sup>1</sup>; or
- 3 (3) any corresponding limit or reduction under the law of a country outside England and Wales<sup>2</sup>,

then the person from whom the contribution is sought must not be required<sup>3</sup> to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced<sup>4</sup>. This means that the amount of contribution to be ordered cannot exceed the amount that the respondent to the contribution claim could be held liable to pay the person suffering the damage, taking into account the latter's contributory negligence and any statutory or contractual provision made before the damage occurred that may limit those damages<sup>5</sup>.

1   le by virtue of the Law Reform (Contributory Negligence) Act 1945 s 1 (as amended) or the Fatal Accidents Act 1976 s 5 (as amended): see NEGLIGENCE vol 78 (2010) PARA 75.

2   See *RA Lister & Co Ltd v EG Thomson (Shipping) Ltd, The Benarty (No 2)* [1987] 3 All ER 1032 at 1037-1038, [1987] 1 WLR 1614 at 1620-1621 per Hobhouse J; and see now the Private International Law (Miscellaneous Provisions) Act 1995; and CONFLICT OF LAWS.

3   le by virtue of any contribution awarded under the Civil Liability (Contribution) Act 1978 s 1: see PARA 839 et seq ante.

4   Ibid s 2(3).

5   See *Saipern SpA and Conoco (UK) Ltd v Dredging VO2 BV and Geosite Surveys Ltd, The Volvox Hollandia (No 2)* [1993] 2 Lloyd's Rep 315.

#### **UPDATE**

#### **826-850 General Rules on Assessment of Damages**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(vi) Contribution/846. Procedure for contribution claim.

#### **846. Procedure for contribution claim.**

The assessment of contribution does not affect or concern the plaintiff, and a claim may be sought by one of the persons concerned either on application at the close of the plaintiff's action without formal or separate proceedings<sup>1</sup>, by third party procedure<sup>2</sup> or by separate proceedings. An appellate court will make its own apportionment if it re-hears the case<sup>3</sup>, otherwise the decision of the trial judge will be altered on appeal only when it is clearly wrong or there has been an error in principle or a mistake of fact<sup>4</sup>. The court also has power to determine the issue of contribution between defendants where the plaintiff's action has been settled and there are no formal third party proceedings<sup>5</sup>.

1 *Croston v Vaughan* [1938] 1 KB 540, [1937] 4 All ER 249, CA; *Bell v Holmes* [1956] 3 All ER 449, [1956] 1 WLR 1359; *T Oertli A-G v EJ Bowman (London) Ltd* [1956] RPC 341. The court also has power to determine the issue of contribution between defendants where the plaintiff's action has been settled and there are no formal third party proceedings: *Stott v West Yorkshire Road Car Co Ltd* [1971] 2 QB 651, [1971] 3 All ER 534, CA. Separate proceedings are necessary if discovery or interrogatories are required: *Clayson v Rolls Royce Ltd* [1951] 1 KB 746, [1950] 2 All ER 884, CA.

2 See RSC Ord 16 r 1 (third party notice); Ord 16 r 8 (contribution notice between defendant and another party to the action); and CIVIL PROCEDURE. As to third party procedure in the county court see CCR Ord 12; and COURTS.

3 See *Hanson v Wearmouth Coal Co Ltd and Sunderland Gas Co* [1939] 3 All ER 47, CA, (appeal court has power to order contribution against a defendant who was successful in the court below even though the plaintiff has not appealed against that defendant).

4 *Ingram v United Automobile Service Ltd* [1943] KB 612, [1943] 2 All ER 71, CA; *The MacGregor* [1943] AC 197, [1943] 1 All ER 33, HL; *Brown v Thompson* [1968] 2 All ER 708, [1968] 1 WLR 1003, CA; *Kerry v Carter* [1969] 3 All ER 723, [1969] 1 WLR 1372, CA; *Rouse v Squires* [1973] QB 889, [1973] 2 All ER 903, CA; *Baker v Willoughby* [1970] AC 467, [1969] 3 All ER 1528, HL. See also *London Passenger Transport Board v Upson* [1949] AC 155, [1949] 1 All ER 60, HL; *Ward v TE Hopkins & Son Ltd*, *Baker v TE Hopkins & Son Ltd* [1959] 3 All ER 225, CA; *Quintas v National Smelting Co Ltd* [1961] 1 All ER 630, [1961] 1 WLR 401, CA; *Donaghey v P O'Brien & Co* [1966] 2 All ER 822, [1966] 1 WLR 1170, CA; *The Miraflores and The Abadesa* [1967] 1 AC 826, [1967] 1 All ER 672, HL; *The Toni* [1974] 1 Lloyd's Rep 489, CA; *Diboll v City of Newcastle* [1993] PIQR P16, CA.

5 *Stott v West Yorkshire Road Car Co Ltd* [1971] 2 QB 651, [1971] 3 All ER 534, CA.

#### **UPDATE**

#### **826-850 General Rules on Assessment of Damages**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(vi) Contribution/847. Costs.

#### **847. Costs.**

If more than one action is brought in respect of any damage by or on behalf of the person by whom it was suffered against persons liable in respect of the damage (whether jointly or otherwise) the plaintiff is not entitled to costs in any of those actions, other than that in which judgment is first given, unless the court is of the opinion that there was reasonable ground for bringing the action<sup>1</sup>. Where in any action the damages assessed have been apportioned as between defendants or reduced by reason of the plaintiff's contributory negligence, the costs of the action remain entirely within the court's discretion. In the former case the costs payable to the plaintiff will frequently be apportioned between the defendants in the same proportion as the damages<sup>2</sup>, and in the latter case the plaintiff will usually be awarded his costs<sup>3</sup>, even though his damages have been reduced.

1 Civil Liability (Contribution) Act 1978 s 4. This removes the restriction on damages in later proceedings to the amount recovered in the first judgment.

2 A defendant may make a written offer to a co-defendant to contribute to a specified extent to the plaintiff's damages and this may affect the order for costs in the same way as a payment into court: see RSC Ord 16 r 10.

#### **UPDATE**

#### **UPDATE**

#### **826-850 General Rules on Assessment of Damages**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(vii) Interest/848. In general.

## **(vii) Interest**

### **848. In general.**

When damages have been awarded<sup>1</sup> and constitute a judgment debt, they carry interest until payment<sup>2</sup>. At common law there is no general right to the award of interest with damages for the period before judgment or prior payment of compensation<sup>3</sup>, though in Admiralty interest is awarded on both damages<sup>4</sup> and salvage<sup>5</sup>.

There are specific exceptions at common law, including agreements<sup>6</sup> to pay interest on the occurrence of an event<sup>7</sup>, negotiable instruments<sup>8</sup> and certain obligations relating to real<sup>9</sup> and personal property<sup>10</sup>. Moreover, whilst interest on damages cannot be claimed under the first head in *Hadley v Baxendale*<sup>11</sup> as arising naturally according to the usual course of events<sup>12</sup>, it can be claimed on the basis of specific information under the second rule in that case<sup>13</sup>. These restrictions apply only to claims for interest as compensation for late payment. If a plaintiff can show loss other than the simple deprivation of money he can recover interest even on the basis of the first head in *Hadley v Baxendale*<sup>14</sup>.

For some time, the courts have had discretionary powers to award interest on damages for some or all of the period from the loss or damage to the award of damages or prior payment of compensation in the course of the litigation<sup>15</sup>. The current legislation<sup>16</sup> provides that, subject to rules of court, in proceedings (whenever instituted) in the High Court or the county court<sup>17</sup> for the recovery of a debt or damages<sup>18</sup> there may be included in any sum for which judgment is given simple interest at such rate as the court thinks fit or as rules of court may provide<sup>19</sup> on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date on which the cause of action arose and (1) in the case of any sum paid before judgment, the date of the payment; and (2) in the case of the sum for which judgment is given, the date of the judgment<sup>20</sup>.

Unless the court is satisfied that there are special reasons to the contrary, in an action for personal injury or death when the damages exceed £200, an award of interest must be made, though the other elements of discretion as to rate, division and time are unaffected<sup>21</sup>. Interest may be calculated at different rates for different periods<sup>22</sup>.

In cases other than those of personal injury and wrongful death the court is thus given a five-fold discretion. Firstly, it can decide whether the case is one in which interest ought to be awarded at all. Secondly, the court has discretion as to the rate of interest to be awarded. Thirdly, it can decide on what part of the damages interest ought to be awarded. Fourthly, it has discretion as to the period between accrual of the cause of action and judgment or payment for which interest should be awarded. Lastly, it can decide whether to take different rates for different periods<sup>23</sup>. In the case of personal injury or wrongful death, there is only a four-fold discretion, as there is no discretion not to award interest<sup>24</sup>.

1 When there is a split trial, first on liability and then on quantum, this interest runs from the final judgment on quantum (see *Thomas v Bunn*, *Wilson v Graham*, *Lea v British Aerospace plc*[1991] 1 AC 362, [1991] 1 All ER 193, HL), though interest on costs runs from judgment, not the subsequent taxation (see *Hunt v RM Douglas (Roofing) Ltd*[1990] 1 AC 398, [1988] 3 All ER 823, HL).

2 Judgments Act 1838 s 17 (amended by the Statute Law Revision (No 2) Act 1888; the Civil Procedure Acts Repeal Act 1879 s 2, Schedule Pt I). Power to alter the rate is given by the Administration of Justice Act 1970 s 44(1), this being simple interest (see the text to note 19 infra). The Arbitration Act 1996 s 49(4) has given

arbitrators the power, subject to contrary agreement, to award simple or compound interest, from the date of the award or a later date, until payment. As to the rate on judgment debts see the Judgments Debts (Rate of Interest) Order 1993, SI 1993/564, art 2, amending the Judgments Act 1838 s 17 to state a figure of 8% in relation to judgments entered on or after 1 April 1993. As to county courts see the County Courts Act 1984 s 74 (amended by the Private International Law (Miscellaneous Provisions) Act 1995 s 2); the County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184 (amended by SI 1996/2516); and CIVIL PROCEDURE. As to interest in equity see further PARA 1131 post.

3 *London, Chatham and Dover Rly v South Eastern Rly Co* [1893] AC 429, HL. Equity allowed interest in accounting by a fiduciary: see *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA; *Mathew v TM Sutton Ltd* [1994] 4 All ER 793, [1994] 1 WLR 1455 (which allowed interest as ancillary relief).

4 *The Dundee* (1827) 2 Hag Adm 137; *The Amalia* (1864) 5 New Rep 164n; *The Northumbria* (1869) LR 3 A & E 6; *The Gertrude* (1887) 12 PD 204; *The Kong Magnus* [1891] P 223; *The Joannis Vatis (No 2)* [1922] P 213; *Liesbosch Dredger (Owners) v SS Edison (Owners)* [1933] AC 449, HL; *The Berwickshire* [1950] P 204, [1950] 1 All ER 699; *The Norseman* [1957] P 224, [1957] 2 All ER 660. The Admiralty Court may not award interest on debts paid before judgment: *President of India v La Pintada Cia Navigacion SA* [1985] AC 104, [1984] 2 All ER 773, HL. In non-Admiralty cases loss of use of profit-earning chattels may either be reflected in the quantum of damages, or the discretion given by statute to award interest may be exercised: see the Supreme Court Act 1981 s 35A (as added); and the text and notes 16-22 infra; and *Metal Box Ltd v Currys Ltd* [1988] 1 All ER 341, [1988] 1 WLR 175.

5 *Tyne Tugs Ltd v MV Aldora (Owners), The Aldora* [1975] QB 748, [1975] 2 All ER 69; *The Ben Gairn* [1979] 1 Lloyd's Rep 410; *The Rilland* [1979] 1 Lloyd's Rep 455.

6 The agreement may be implied: see *FG Minter Ltd v Welsh Health Technical Services Organisation* (1980) 13 BLR 1, CA; cf *Alsabah Maritime Services Co Ltd v Philippine International Shipping Corpn* [1984] 1 Lloyd's Rep 291 where the terms of the contract were construed as excluding interest.

7 *Higgins v Sargent* (1823) 2 B & C 348; *Janred Properties Ltd v Ente Nazionale Italiano per il Turismo* [1989] 2 All ER 444, CA; *Petre v Duncombe* (1851) 20 LJQB 242; *Cook v Fowler* (1874) LR 7 HL 27.

8 See *Slack v Lowell* (1810) 3 Taunt 157 where there was failure to make payment, as promised, by bill of exchange; and see the Bills of Exchange Act 1882 s 57 (as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1602.

9 *Bushwall Properties Ltd v Vortex Properties Ltd* [1975] 2 All ER 214, [1975] 1 WLR 1649 (revsd on other grounds [1976] 2 All ER 283, [1976] 1 WLR 591, CA) (plaintiffs borrowed to complete purchase when sellers broke agreement to accept instalments); *De Bernales v Wood* (1812) 3 Camp 258; *Farquhar v Farley* (1817) 7 Taunt 592; *Hodges v Litchfield* (1835) 1 Bing NC 492; *Keen v Mear* [1920] 2 Ch 574 (recovery of deposit on failure of transaction).

10 *Panchaud Frères SA v R Pagnan and Fratelli* [1974] 1 Lloyd's Rep 394, CA; *Zijden Wildhandel v Tucker and Cross* [1976] 1 Lloyd's Rep 341 (failure to deliver goods when market price higher than contract so that substitutes would be more expensive); *British Columbia Saw Mill Co v Nettleship* (1868) LR 3 CP 499 (goods lost by a carrier) but in the similar case of *Cousins & Co Ltd v D and C Carriers Ltd* [1971] 2 QB 230, [1971] 1 All ER 55, CA, a discretionary award of interest under legislation was made.

11 See *Hadley v Baxendale* (1854) 9 Exch 341.

12 *President of India v La Pintada Cia Navigacion SA* [1985] AC 104, [1984] 2 All ER 773, HL; *Chiswell Shipping Ltd v National Iranian Tanker Co, The World Symphony* [1991] 2 Lloyd's Rep 251 (affd [1992] 2 Lloyd's Rep 115, CA).

13 *Wadsworth v Lydall* [1981] 2 All ER 401, [1981] 1 WLR 598, CA; approved in *President of India v La Pintada Cia Navigacion SA* [1985] AC 104, [1984] 2 All ER 773, HL.

14 See *President of India v Lips Maritime Corpn, The Lips* [1988] AC 395 at 424, [1987] 3 All ER 110 at 116, HL, per Lord Brandon. An example is loss from foreign currency fluctuation in exchange rates: see *International Minerals & Chemical Corpn v Karl O Helm A-G* [1986] 1 Lloyd's Rep 81.

15 Interest cannot be awarded on payments made before the commencement of proceedings: *IM Properties plc v Cape and Dagleish (a firm)* [1998] 3 All ER 203, [1998] 3 WLR 457, CA; *Chiswell Shipping v National Iranian Tanker Co, The World Symphony* [1991] 2 Lloyd's Rep 251 (affd [1992] 2 Lloyd's Rep 115, CA). See also *Edmunds v Lloyd Italico e L'Ancora Cia di Assicurazioni e Riassicurazioni SpA* [1986] 2 All ER 249, [1986] 1 WLR 492, CA.

16 See the Supreme Court Act 1981 s 35A (added by the Administration of Justice Act 1982 s 15(1), Sch 1 Pt 1) (High Court); the County Courts Act 1984 s 69 (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 46) (county court). Both these provisions apply to judgments given in proceedings by and against the Crown: see the Crown Proceedings Act 1947 s 24(3); and CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 135.

17 The County Courts Act 1984 s 69 (as amended: see note 16 supra) differs from the Supreme Court Act 1981 s 35A (as added: see note 16 supra) in not providing for the fixing of rates of interest by reference to the Judgments Act 1838 s 17 (as amended: see note 2 supra) and in further providing that, in determining whether the amount of any debt or damages exceeds that prescribed by or under any enactment, no account is to be taken of any interest payable by virtue of the County Courts Act 1984 s 69 (as amended) except where express provision to the contrary is made by or under that or any other enactment: see s 69(8) (added by the Courts and Legal Services Act 1990 Sch 18 para 46). The County Courts Act 1984 s 74 (as amended) makes provision for interest on judgment debts in county courts: see note 2 supra.

18 Nothing in the Supreme Court Act 1981 s 35A (as added) affects the damages recoverable for the dishonour of a bill of exchange: s 35A(8) (as added: see note 16 supra). As to such damages see the Bills of Exchange Act 1882 s 57 (as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1602.

19 Without prejudice to the generality of the Supreme Court Act 1981 s 84 (power to make rules of court: see generally CIVIL PROCEDURE), rules of court may provide for a rate of interest by reference to the rate specified in the Judgments Act 1838 s 17 (as amended) as that section has effect from time to time or by reference to a rate for which any other enactment provides: Supreme Court Act 1981 s 35A(5) (as added: see note 16 supra). As to the rate specified in the Judgments Act 1838 s 17 (as amended) see note 2 supra.

20 Supreme Court Act 1981 s 35A(1) (as added: see note 16 supra); and see the County Courts Act 1984 s 69(1). There is specific provision for debt in the Supreme Court Act 1981 s 35A(3) (as so added) and in the County Courts Act 1984 s 69(3). Interest on a debt must not be awarded for any period during which, for whatever reason, interest on the debt already runs: Supreme Court Act 1981 s 35A(4) (as so added); County Courts Act 1984 s 69(4). If a contract is rescinded by the plaintiff before payment is due, the debt ceases to exist and interest will only be available on the damages: see *Janred Properties Ltd v Ente Nazionale Italiano per il Turismo* [1989] 2 All ER 444, CA. In an action for negligent overvaluation the cause of action arises whenever a relevant and measurable loss is first recorded which will usually be default by the borrower; but the lender may show loss at an earlier date: *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305, [1997] 1 WLR 1627, HL.

21 See the Supreme Court Act 1981 s 35A(2) (as added: see note 16 supra); the County Courts Act 1984 s 69(2). These provisions originated with the Administration of Justice Act 1969 s 22 (repealed).

22 Supreme Court Act 1981 s 35A(6) (as added: see note 16 supra); County Courts Act 1984 s 69(5).

23 See the text and notes 16-20 supra.

24 See the text and note 21 supra.

## UPDATE

### 826-850 General Rules on Assessment of Damages

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 848 In general

NOTE 2--See *Spencer v Wilson (No 2)* 1998 SLT 688.

NOTES 15-22--Where interim payments are made after judgment is given as to liability and subsequently invested, interest accruing on them is not to be taken into account in the final determination of damages: *Parry v North West Surrey Health Authority* (2000) Times, 5 January.

NOTES 16-22--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTES 16-20--See *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC*[2007] UKHL 34, [2007] 4 All ER 657 (Community law required award of compound interest).

NOTE 20--See also *R (on the application of Elite Mobile plc) v Customs and Excise Comrs*[2004] EWHC 2923 (Admin), [2005] STC 275; and *R (on the application of Kemp) v Denbighshire Local Health Board*[2006] EWHC 181 (Admin), [2006] 3 All ER 141.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(vii) Interest/849. Pleading interest.

### **849. Pleading interest.**

It is considered in the Supreme Court Practice, and it is the generally accepted view among practitioners, that a claim for interest must be specifically pleaded, both in the body of the pleading and in the prayer. The need to claim interest in the prayer arises from the need to plead what relief or remedy is being sought in an action<sup>1</sup>. The obligation to set out the claim for interest in the body of the pleading would appear to arise from first principles: one seeks to recover interest by making a claim to it. The pleading should therefore contain a statement in a summary form of the material facts on which the claimant relies. Accordingly, it must identify the basis on which it is claimed. There should be a direct reference to the specific statutory or other basis on which it is claimed. If there is not, then no interest can be recovered<sup>2</sup>.

Other matters of practice and procedure in relation to damages are dealt with elsewhere in this title<sup>3</sup>.

1 See RSC Ord 18 r 15(1); and CIVIL PROCEDURE.

2 In *Ward v Chief Constable for Avon and Somerset* (1985) 129 Sol Jo 606, no award of interest was made because no pleaded claim had been made, and no amendment was made prior to judgment. But note *McDonald's Hamburgers Ltd v Burger King (UK) Ltd* [1987] FSR 112 at 123-124, CA, per Sir Denys Buckley. The report contains an interesting discussion between counsel and the Court of Appeal as to whether it is necessary to plead interest twice, once in the body of the pleading and once in the prayer. Counsel argued that the obligation to let the other side know what case is being advanced was met by pleading the claim to interest once in the prayer. Fox LJ's initial concern was that interest is a claim, therefore the natural place to plead the claim would be in the body thereof, where the facts giving rise to the claim are set out. It was held that the claim to interest was sufficiently pleaded by inclusion in the prayer alone. The judgment of Fox LJ simply read: 'we all take the view that this claim is sufficiently pleaded for the purposes of the rule'.

3 See PARA 1145 et seq post.

## **UPDATE**

### **826-850 General Rules on Assessment of Damages**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/3. PRINCIPLES COMMON TO CONTRACT AND TORT/(2) GENERAL RULES ON ASSESSMENT OF DAMAGES/(vii) Interest/850. Calculation of the award of interest.

### **850. Calculation of the award of interest.**

Due to the restriction on the discretion of the court first imposed in 1969 in respect of claims for personal injury and death<sup>1</sup> courts now itemise heads of damages in such cases<sup>2</sup>. In personal injury cases no interest is payable on damages for future pecuniary loss since there has as yet been no deprivation of money, but interest is given on special damages for loss of earnings and medical expenses up to trial and on damages for non-pecuniary loss<sup>3</sup>. In fatal accidents claims damages are based on what the deceased would have earned at the date of trial, so interest is awarded on loss of dependency up to trial but not on such loss thereafter<sup>4</sup>. A one-half rule applies in relation to special damages<sup>5</sup>.

Interest on damages for non-pecuniary loss has been refused in the torts of deceit and false imprisonment<sup>6</sup>.

As interest is intended to make good deprivation of money<sup>7</sup> or its equivalent<sup>8</sup> if, on the facts, there is no deprivation<sup>9</sup> or, because there is an award of restitutionary damages, all loss is otherwise made good<sup>10</sup>, there will be no award of interest. If the loss to the plaintiff is diminished because of a reduction of taxation consequent upon the loss<sup>11</sup>, or by other financial arrangements<sup>12</sup>, this may be taken into account in fixing interest. Unless there has been unjustified delay, which also may be taken into account in fixing interest<sup>13</sup>, it should in principle run from the loss<sup>14</sup>. For non-pecuniary loss in personal injury claims, the general rule is that it runs from service of the writ to judgment<sup>15</sup>. In fatal accidents, interest on pecuniary loss runs from death to judgment but does not include post-trial loss<sup>16</sup>. Where in personal injury claims there is sporadic or fragmented loss (such as medical bills or loss of instalments of salary or other income) simplification of the calculation is effected either by awarding half the normal rate for the whole period or the normal rate for half the period<sup>17</sup>. The rule is not invariable, and in an appropriate case the one-half rule will not apply<sup>18</sup>. Loss of earnings is a classic form of special damage to which the one-half rate rule should apply. However, not all losses fall into such a pattern and thus not all losses fall to be dealt with on this basis. In exceptional cases, such as when one party or the other has been guilty of gross delay, the court may depart from the above guidelines by diminishing or increasing the award of interest or altering the periods for which it is allowed<sup>19</sup>.

Comparable simplification may be effected in commercial cases<sup>20</sup>. The courts must use simple interest<sup>21</sup>, though arbitrators may use compound interest<sup>22</sup>. It is assumed that the plaintiff would have borrowed to replace the assets of which he has been deprived and therefore, in commercial cases<sup>23</sup> and in Admiralty cases<sup>24</sup> there is a presumption in favour of base rate with 1 per cent added to cover costs of borrowing<sup>25</sup>, though it is recognised that small organisations may have greater difficulty than large ones in borrowing and so may be awarded a higher additional percentage<sup>26</sup>. In foreign currency cases the rate in the relevant country may be used<sup>27</sup>. In personal injury cases, rates approximating to commercial rates but based on the Supreme Court Fund Rules are used for pecuniary losses<sup>28</sup> and 2 per cent given for non-pecuniary losses<sup>29</sup> with higher rates for bereavement<sup>30</sup>. In other cases the rates for judgment debts have been used<sup>31</sup>.

1 See PARA 848 note 21 ante.

2 *Jefford v Gee* [1970] 2 QB 130, [1970] 1 All ER 1202, CA.

- 3 *Jefford v Gee* [1970] 2 QB 130, [1970] 1 All ER 1202, CA, confirmed on non-pecuniary awards in *Pickett v British Rail Engineering Ltd, British Rail Engineering Ltd v Pickett* [1980] AC 136, [1979] 1 All ER 774, HL and *Wright v British Railways Board* [1983] 2 AC 773, [1983] 2 All ER 698, HL.
- 4 *Cookson v Knowles* [1979] AC 556, [1978] 2 All ER 604, HL.
- 5 *Cookson v Knowles* [1979] AC 556, [1978] 2 All ER 604, HL; *Jefford v Gee* [1970] 2 QB 130, [1970] 1 All ER 1202, CA; and see the text and notes 17-19 infra. If a party wishes to argue that the one-half approach to interest should not be followed, this should be expressly raised in the pleadings: *Dodd v Rediffusion (West Midlands) Ltd* [1980] CLY 635. As to pleading interest see PARA 849 ante.
- 6 *Saunders v Edwards* [1987] 2 All ER 651, [1987] 1 WLR 1116, CA; *Holtham v Metropolitan Police Comr* [1987] CLY 1154.
- 7 *Jefford v Gee* [1970] 2 QB 130 at 144, [1970] 1 All ER 1202 at 1206, CA, per Lord Denning MR; *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447 at 468, [1970] 1 All ER 225 at 236, CA, per Lord Denning MR; *Applegate v Moss* [1971] 1 QB 406, [1971] 1 All ER 747, CA. If a plaintiff was insured in respect of his loss and has recovered his loss from his own insurers he should only be awarded interest in respect of the period after his insurers paid him if his insurers are entitled to reclaim that interest from him: *H Cousins & Co Ltd v D & C Carriers Ltd* [1971] 2 QB 230, [1971] 1 All ER 55, CA, explaining *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* supra. In simple contract and in tort actions a starting point in deciding what interest to order and at what rate is found in the Judgments Act 1838 s 17 (as amended), whereby every judgment carries a prescribed rate of interest from the time of entering judgment: see PARA 848 note 2 ante.
- 8 *Jefford v Gee* [1970] 2 QB 130 at 146, [1970] 1 All ER 1202 at 1208, CA, per Lord Denning MR; *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 974, [1979] 1 WLR 783 at 845 per Robert Goff J; *Tate & Lyle Food and Distribution Ltd v Greater London Council* [1981] 3 All ER 716 at 722, [1982] 1 WLR 149 at 154 per Forbes J (revsd on appeal on other grounds [1982] 2 All ER 854n, [1982] 1 WLR 971n; CA; decision on appeal affd sub nom *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, [1983] 1 All ER 1159, HL); *Wentworth v Wiltshire County Council* [1993] QB 654 at 669, [1993] 2 All ER 256 at 269, CA.
- 9 See eg *Giles v Thompson* [1994] 1 AC 142, [1993] 3 All ER 321, HL (replacement cars provided and hire charges repaid free of interest).
- 10 *Whitwham v Westminster Brymbo* [1896] 1 Ch 894 (affd without reference to this [1896] 2 Ch 538, CA); cf *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, [1952] 1 All ER 796, CA; *Hillesden Securities Ltd v Ryjak Ltd* [1983] 2 All ER 184, [1983] 1 WLR 959.
- 11 *Tate & Lyle Food and Distribution v Greater London Council* [1981] 3 All ER 716, [1982] 1 WLR 149; as to the subsequent reversal of this case on liability see note 8 supra.
- 12 *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, CA; *Deeny v Gooda Walker Ltd (in liquidation)* [1995] 4 All ER 289, [1995] 1 WLR 1206; cf *Deeny v Gooda Walker Ltd (in liquidation) (No 2)* [1996] 1 All ER 933, [1996] 1 WLR 426, HL (tax ignored in assessing damages); *John v James* [1986] STC 352.
- 13 *General Tire and Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 2 All ER 173, [1975] 1 WLR 819, HL; *Birkett v Hayes* [1982] 2 All ER 710, [1982] 1 WLR 816, CA; *Metal Box v Currys* [1988] 1 All ER 341, [1988] 1 WLR 175; *Pritchard v Cobden* [1988] Fam 22, [1987] 1 All ER 300, CA; *Spittle v Bunney* [1988] 3 All ER 1031, [1988] 1 WLR 847, CA; *Cresswell v Eaton* [1991] 1 All ER 484, [1991] 1 WLR 1113; *Corbett v Barking Health Authority* [1991] 2 QB 408, [1991] 1 All ER 498, CA. Delay has been dealt with by adjusting the period not the rate despite the suggestion of Staughton J in *La Pintada Cia Navegacion SA v President of India* [1983] 1 Lloyd's Rep 37 that rate might be used. But see *Derby Resources AG v Blue Corinth Marine Co Ltd (No 2)* (30 April 1998, unreported), QBD (reduction of rate over whole period for undue delay).
- 14 *BP Exploration v Hunt (No 2)* [1982] 1 All ER 925 at 975, [1979] 1 WLR 783 at 846 per Robert Goff J (affd [1983] 2 AC 352, [1982] 1 All ER 925, HL); *Slater v Hughes* [1971] 3 All ER 1287, [1971] 1 WLR 1438, CA.
- 15 *Jefford v Gee* [1970] 2 QB 130, [1970] 1 All ER 1202, CA. For a third party, interest runs only from service of the third party notice (*Slater v Hughes* [1971] 3 All ER 1287, [1971] 1 WLR 1438, CA), even though interest on the pecuniary losses runs from the injury. This was confirmed in *Pickett v British Rail Engineering Ltd, British Rail Engineering Ltd v Pickett* [1980] AC 136, [1979] 1 All ER 774, HL; *Wright v British Railways Board* [1983] 2 AC 773, [1983] 2 All ER 698, HL. Low rates have been awarded on non-pecuniary loss: see eg *Birkett v Hayes* [1982] 2 All ER 710, [1982] 1 WLR 816, CA (rate of 2% awarded).
- 16 *Cookson v Knowles* [1979] AC 556, [1978] 2 All ER 604, HL.



17 *Birkett v Hayes* [1982] 2 All ER 710, [1982] 1 WLR 816, CA; *Jefford v Gee* [1970] 2 QB 130, [1970] 1 All ER 1202, CA.

18 In *Prokop v Department of Health and Social Security* [1985] CLY 1037, CA, May LJ found that the one-half rate approach is applicable only to cases where the special damages comprise more or less periodical losses which are continuous from the date of the accident to the date of trial. Where the special damage is suffered at the time of the incident from which the general damages claim arises, interest on special damages may be awarded at the full rate: *Ichard v Frangoulis* [1977] 2 All ER 461, [1977] 1 WLR 556; contra *Dexter v Courtaulds* [1984] 1 All ER 70, [1984] 1 WLR 372, CA, following *Jefford v Gee* [1970] 2 QB 130, [1970] 1 All ER 1202, CA.

19 *Prokop v Department of Health and Social Security* [1985] CLY 1037, CA. See also note 5 supra.

20 *Tate & Lyle Food and Distribution v Greater London Council* [1981] 3 All ER 716, [1982] 1 WLR 149; as to the reversal of this case on liability see note 8 supra. In building and in commercial cases, it will be more common for interest to be awarded at a commercial rate: see the text and notes 23-26 infra.

21 See PARA 848 ante.

22 The Arbitration Act 1996 s 49(4) has given arbitrators the power, subject to contrary agreement, to award simple or compound interest, from the date of the award or a later date, until payment. Equity may also use compound interest in requiring a fiduciary to account: *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA. As to interest in equitable damages cases see further PARA 1131 post.

23 *FMC (Meat) Ltd v Fairfield Cold Stores Ltd* [1971] 2 Lloyd's Rep 221; *International Military Services Ltd v Capital and Counties plc* [1982] 2 All ER 20, [1982] 1 WLR 575; *BP Exploration v Hunt (No 2)* [1982] 1 All ER 925, [1979] 1 WLR 783 (affd [1983] 2 AC 352 [1982] 1 All ER 925, HL); *Polish Steamship Co v Atlantic Maritime Co, The Garden City* [1985] QB 41, [1984] 3 All ER 59, CA; *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd (No 2)* [1990] 3 All ER 723, [1990] 1 Lloyd's Rep 441. As to non-commercial cases see *Tate & Lyle Food and Distribution v Greater London Council* [1981] 3 All ER 716, [1982] 1 WLR 149 (revsd on liability: see note 8 supra); *Metal Box Ltd v Currys Ltd* [1988] 1 All ER 341, [1988] 1 WLR 175.

24 *The Rilland* [1979] 1 Lloyd's Rep 455; *Polish Steamship Co v Atlantic Maritime Co, The Garden City* [1985] QB 41 at 66-67, [1984] 3 All ER 59 at 77, CA, per Kerr LJ stating identity of practice as between the Commercial and Admiralty Courts.

25 *Miliangos v George Frank (Textiles) Ltd (No 2)* [1977] QB 489 at 496, [1976] 3 All ER 599 at 602 per Bristow J. The court does not consider the rate at which the plaintiff may have borrowed.

26 *Tate & Lyle Food and Distribution v Greater London Council* [1981] 3 All ER 716 at 722, [1982] 1 WLR 149 at 154 (revsd on liability: see note 8 supra); *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd (No 2)* [1990] 3 All ER 723, [1990] 1 Lloyd's Rep 441 (pointing out that it is the category to which the plaintiff belongs, not special characteristics, which is relevant and explaining Bristow J in *Miliangos v George Frank (Textiles) Ltd (No 2)* [1977] QB 489 at 496, [1976] 3 All ER 599 at 602). See also *Catnic Components v Hill & Smith Ltd* [1983] FSR 512.

27 *Shell Tankers (UK) Ltd v Astro Comino Armadora SA, The Pacific Colocotronis* [1981] 2 Lloyd's Rep 40, CA; *Miliangos v George Frank (Textiles) Ltd (No 2)* [1977] QB 489, [1976] 3 All ER 599; *Helmsing Schifahrts v Malta Drydocks Corp* [1977] 2 Lloyd's Rep 444.

28 *Jefford v Gee* [1970] 2 QB 130, [1970] 1 All ER 1202, CA.

29 *Birkett v Hayes* [1982] 2 All ER 710, [1982] 1 WLR 816, CA; approved in *Wright v British Railways Board* [1983] 2 AC 773, [1983] 2 All ER 698, HL; *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1998] 3 WLR 329, HL.

30 *Prior v Hastie* [1987] CLY 1219; *Khan v Duncan* (9 March 1990, unreported), QBD; 1 Kemp & Kemp *Quantum of Damages* (1998) PARA 16-032.

31 *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 1421, CA (surveyor). As to the current rate for judgment debts see PARA 848 note 2 ante.

## UPDATE

### 826-850 General Rules on Assessment of Damages

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **850 Calculation of the award of interest**

NOTES--As to the award of interest on an interim payment, see *Kuwait Airways Corp v Kuwait Insurance Co SAK (No 2)* [2000] 1 All ER (Comm) 972.

NOTE 4--*Cookson*, cited, followed in *Fletcher (executrix of the estate of Carl Fletcher) v A Train & Sons Ltd* [2008] EWCA Civ 413, [2008] 4 All ER 699.

NOTE 13--*Derby Resources*, cited, reported at [1998] 2 Lloyd's Rep 425.

NOTE 29--There is no intrinsic reason to increase the guideline rate of interest of 2 per cent on general damages for pain, suffering and loss of amenity in personal injury cases: *Lawrence v Chief Constable of Staffordshire* (2000) Times, 25 July, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(1) GENERAL PRINCIPLES/851. Introduction: remoteness of damage.

## 4. MEASURE OF DAMAGES IN TORT

### (1) GENERAL PRINCIPLES

#### 851. Introduction: remoteness of damage.

A quartet of cases dominates the current law on the measure of damages in tort<sup>1</sup>. Before these decisions the measure of damages, both in tort and contract, was sometimes expressed in terms of consequences being 'direct', 'natural'<sup>2</sup>, 'necessary', 'probable'<sup>3</sup>, 'proximate', 'ordinary', 'precipitating'<sup>4</sup>, or some combination of these terms. In particular, in the tort of negligence, the defendant was held answerable for all 'direct' consequences, whether foreseeable or not<sup>5</sup>. As a result of these decisions, all earlier cases in negligence and nuisance which use any such phrases are overruled except in so far as those terms reflect a test of foreseeability<sup>6</sup>. Foreseeability is now the primary test of whether damages are recoverable in negligence and nuisance<sup>7</sup> and has also been confirmed for liability under the rule in *Rylands v Fletcher* and private nuisance<sup>8</sup>. Although the vocabulary of the law in this regard has been altered, the practical outcome of cases may be little different as a consequence of the courts placing a wide interpretation on foreseeability<sup>9</sup>. This outcome appears to have been foreseen<sup>10</sup>. Within the scope of damage so measured the purpose remains to put the plaintiff in the same position as if the tort had not been committed<sup>11</sup>.

1 See *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound*[1961] AC 388, [1961] 1 All ER 404, PC; *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2)*[1967] 1 AC 617, [1966] 2 All ER 709, PC; *Koufos v C Czarnikow Ltd*[1969] 1 AC 350, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686, HL; *Cambridge Water Co v Eastern Counties Leather*[1994] 2 AC 264, [1994] 1 All ER 53, HL.

The first two cases (which will be referred to as *The Wagon Mound* and *The Wagon Mound (No 2)* in this note) were concerned with an incident when oil, allowed to spill from a ship into Sydney harbour, caught fire and damaged the wharf and two ships. *The Wagon Mound* supra was an action by the wharf owners and concerns the measure of damages when such a claim is laid in negligence. *The Wagon Mound (No 2)* supra was an action by the shipowners and concerns the measure of damages when such a claim is laid in nuisance. *Koufos v C Czarnikow Ltd* supra is concerned with the measure of damages for breach of contract, and is fully considered in para 1016 post, but aspects of tortious liability were considered incidentally in the case, and these are referred to in eg para 852 post. *Cambridge Water Co v Eastern Counties Leather* supra involved the escape of poisonous industrial substances into underground water: see PARA 853 post. See also generally TORT.

2 Cf *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2)* [1967] 1 AC 617 at 634, [1966] 2 All ER 709 at 713, PC, where 'natural' was said to be peculiarly ambiguous, and 'probable' to have been used with various shades of meaning.

3 See note 2 supra.

4 Cf *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound*[1961] AC 388 at 424, [1961] 1 All ER 404 at 414, PC, where the use of the phrase 'immediate physical consequences' in *Liebosch, Dredger v SS Edison*[1933] AC 449, HL, was disapproved, and it was suggested that in *Roe v Minister of Health*[1954] 2 QB 66 at 85, [1954] 2 All ER 131 at 138, CA, Denning LJ used the phrase 'immediate or precipitating cause' for revealing or disguising the fact that he sought loyally to enforce an unworkable rule.

5 The test of 'direct' consequences was laid down in *Re Polemis and Furness, Withy & Co Ltd*[1921] 3 KB 560, CA, the decision in which, together with certain observations in other cases expressing a similar view (see eg *Smith v London and South Western Rly Co*(1870) LR 6 CP 14, Ex Ch; *HMS London*[1914] P 72; *Weld-Blundell v Stephens*[1920] AC 956 at 984, HL, per Lord Sumner) was expressly disapproved in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound*[1961] AC 388 at 417, 422, 424-425, [1961] 1 All ER 404 at 410, 413-414, PC.

6 See *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound* [1961] AC 388, [1961] 1 All ER 404, PC; *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2)* [1967] 1 AC 617, [1966] 2 All ER 709, PC; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 422, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 715-716, HL, per Lord Upjohn; and see *Hughes v Lord Advocate* [1963] AC 837, [1963] 1 All ER 705, HL (the fact that danger actually arising was not identical to danger reasonably foreseeable did not necessarily prevent liability arising). 'If it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them': *The Wagon Mound* supra at 423 and 413.

In the *Wagon Mound (No 2)* supra at 636 and 714, it was said that it would have served no useful purpose in that case to examine the grounds of judgment in earlier cases of negligence. In so far as they are ambiguous they must now be interpreted in the light of *The Wagon Mound* supra and *Hughes v Lord Advocate* supra; in so far as they exclude foreseeability they must be taken to be disapproved; and insofar as they take account of foreseeability they do no more than amplify the grounds of judgment in those two cases. 'It is not sufficient that the injury suffered by the respondents' vessels was the direct result of the nuisance if that injury was in the relevant sense unforeseeable': *The Wagon Mound (No 2)* supra at 640 and 717.

7 See the cases cited in note 5 supra; and see PARA 852 post.

8 See PARA 853 post; and *Cambridge Water Co v Eastern Counties Leather* [1994] 2 AC 264, [1994] 1 All ER 53, HL; *Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426, HL. But see *Wringe v Cohen* [1940] 1 KB 229, [1939] 4 All ER 241, CA. As to *Rylands v Fletcher* see NUISANCE vol 78 (2010) PARAS 147-154; and as to private nuisance see NUISANCE vol 78 (2010) PARA 175 et seq.

9 Compare the factually similar cases of *Re Polemis and Furness Withy & Co Ltd* [1921] 3 KB 560, CA, and *The Trecarrell* [1973] 1 Lloyd's Rep 402 (barrel breaking electric cable caused fire).

10 *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound* [1961] AC 388 at 422 [1961] 1 All ER 404 at 413, PC.

11 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per Lord Blackburn; *Monarch Steamship Co v Karlshamns Oljefarbrüker AB* [1949] AC 196 at 221, [1949] 1 All ER 1 at 12-13, HL, per Lord Wright; *Liesbosch Dredger v SS Edison* [1933] AC 449 at 463, HL, per Lord Wright. Exceptionally there may be liability for loss of expectation: *White v Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL; *Ross v Caunters* [1980] Ch 297, [1979] 3 All ER 580 (liability of solicitors to intended beneficiaries of wills).

## UPDATE

### 851 Introduction: remoteness of damage

NOTES--It is unlikely that damages are recoverable for expenditure based on an incorrect assumption as to damage, even if that assumption is itself based on expert advice: *Skandia Property (UK) Ltd v Thames Water Utilities Ltd* [1999] BLR 338, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(1) GENERAL PRINCIPLES/852. General principle: the degree of likelihood.

### **852. General principle: the degree of likelihood.**

In the torts of negligence<sup>1</sup> and nuisance (whether or not negligence is an ingredient in the nuisance)<sup>2</sup>, the wrongdoer is only responsible for any type<sup>3</sup> of damage which should have been foreseen by a reasonable person<sup>4</sup> as being something of which there was a real risk<sup>5</sup>, even though the risk would actually occur only in very exceptional circumstances<sup>6</sup>, or in the most unusual case<sup>7</sup>, unless the risk was so small that the reasonable person would feel justified in neglecting it<sup>8</sup> or brushing it aside as far-fetched<sup>9</sup>. The magnitude of the risk, namely the likelihood of the occurrence and the gravity of potential results, must be weighed against the expense of eliminating it<sup>10</sup>.

In the tort of negligence the degree of likelihood relevant to the measure of damages is the same as the degree of likelihood relevant to the existence of a duty<sup>11</sup>. A plaintiff recovers damages in respect of a foreseeable accident, even though only an accident of that type and not the precise circumstances were foreseeable<sup>12</sup>. A plaintiff also recovers damages for an unforeseeable form of a foreseeable type of injury<sup>13</sup>, and for unforeseeable consequences of a foreseeable type of injury<sup>14</sup>. The degree of likelihood required in the torts of negligence and nuisance is lower than in contract<sup>15</sup>, and this is probably true for most torts<sup>16</sup>, at least for those which are of a non-deliberate or non-malicious nature<sup>17</sup>.

1 *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound* [1961] AC 388, [1961] 1 All ER 404, PC: see PARA 851 note 1 ante. See also TORT.

2 *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2)* [1967] 1 AC 617 at 640, [1966] 2 All ER 709 at 717, PC: see PARAS 851 note 1 ante, 853 note 2 post; TORT.

3 *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2)* [1967] 1 AC 617 at 636, [1966] 2 All ER 709 at 714, PC (injury of a class or character foreseeable as a possible result); and see notes 13-15 infra.

4 *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound* [1961] AC 388, [1961] 1 All ER 404, PC; *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2)* [1967] 1 AC 617 at 640, [1966] 2 All ER 709 at 716, PC. There is no liability for a foreseeable injury when it is not of a type which the defendant was under a duty to guard against: *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, sub nom *South Australia Asset Management Corp v York Montague Ltd* [1996] 3 All ER 365, HL (negligent valuer liable only for difference in values immediately after valuation, not for later losses from general collapse of property market).

5 *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2)* [1967] 1 AC 617 at 642, [1966] 2 All ER 709 at 718, PC.

6 See *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2)* [1967] 1 AC 617 at 644, [1966] 2 All ER 709 at 719, PC.

7 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 385, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 692, HL, per Lord Reid (see PARA 851 note 1 ante); *Stewart v West African Terminals Ltd* [1964] 2 Lloyd's Rep 371 at 375, CA, per Lord Denning MR; *Sullivan v South Glamorgan County Council* (1985) 84 LGR 415; *Draper v Hodder* [1972] 2 QB 556, [1972] 2 All ER 210, CA; *The Trecarrell* [1973] 1 Lloyd's Rep 402.

8 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 385-386, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 692, HL, per Lord Reid, and see at 411 and 708 per Lord Hodson.

9 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 422, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 715, HL, per Lord Upjohn; and see *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2)* [1967] 1 AC 617 at 643, [1966] 2 All ER 709 at 719, PC.

10 *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound* (No 2) 1 AC 617 at 642, [1966] 2 All ER 709 at 718, PC.

11 *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound* [1961] AC 388 at 424-425, [1961] 1 All ER 404 at 414, PC. See also generally NEGLIGENCE. In practice it appears that a higher degree of likelihood is required to establish a duty than for the purposes of remoteness of damage: see *Hughes v Lord Advocate* [1963] AC 837, [1963] 1 All ER 705, HL; *Stewart v West African Terminals Ltd* [1964] 2 Lloyd's Rep 371, 108 Sol Jo 838; *The Trecarrell* [1973] 1 Lloyd's Rep 402.

12 *Hughes v Lord Advocate* [1963] AC 837, [1963] 1 All ER 705, HL (explosion accompanying fire); *Williams v Humphrey* (1975) Times, 20 February.

13 *Hughes v Lord Advocate* [1963] AC 837, [1963] 1 All ER 705, HL; *Bradford v Robinson Rentals Ltd* [1967] 1 All ER 267, [1967] 1 WLR 337 (frostbite due to exposure to cold on business trip). But see *Tremain v Pike* [1969] 3 All ER 1303, [1969] 1 WLR 1556 (injury by infection of different type from injury by rat bite); *Doughty v Turner Manufacturing Co* [1964] 1 QB 518, [1964] 1 All ER 98, CA, (injury by explosion of different type from injury by splash).

14 *Smith v Leech Brain & Co Ltd* [1962] 2 QB 405, [1961] 3 All ER 1159 (burn on lip leading to cancer); *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1 QB 88, [1969] 3 All ER 1681; on appeal when it was settled [1971] 1 QB 111, [1970] 3 All ER 553, CA (minor explosion foreseeable; major explosion occurred: defendants liable). A defendant is liable in full to an unrecognised high earner, the 'shabby millionaire': *The Arpad* [1934] P 189 at 202-203, CA, per Scrutton LJ; *Liesbosch Dredger v SS Edison* [1933] AC 449 at 461, HL, per Lord Wright. The so-called 'egg shell rule' still obtains. The defendant takes the plaintiff as he finds him. If a normal plaintiff would have an action in tort it does not avail the defendant to say that because of some abnormal physical or mental fragility the injury to the plaintiff is more extensive or different in kind from what might have been expected: *Smith v Leech Brain & Co Ltd* supra; *Warren v Scruttons* [1962] 1 Lloyd's Rep 497; *Lines v Harland and Wolff Ltd* [1966] 2 Lloyd's Rep 400; *Boom v Thomas Hubbuck & Son* [1967] 1 Lloyd's Rep 491; *Wieland v Cyril Lord Carpets Ltd* [1969] 3 All ER 1006; *Robinson v Post Office* [1974] 2 All ER 737, [1974] 1 WLR 1176, CA.

As to mental fragility see *Page v Smith* [1994] 4 All ER 522; revsd [1996] AC 155 HL, (predisposition to myalgic encephalomyelitis); *Brice v Brown* [1984] 1 All ER 997, (1984) NLJ 204; *Malcolm v Broadhurst* [1970] 3 All ER 508. However, the defendant does not take the plaintiff's family as he finds them: see *McLaren v Bradstreet* (1969) 113 Sol Jo 471, CA; but see *Nader v Urban Transit Authority* [1985] 2 NSWLR 501 (child). Special susceptibility to lead poisoning from another's clothes was not foreseeable and not remediable, because exposure was very slight: *Hewett v Alf Brown's Transport Ltd* [1992] ICR 530, CA. See also *Gunn v Wallsend Slipway & Engineering Co Ltd* (1989) Times, 23 January.

15 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 385, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 691, HL, per Lord Reid, at 411 and 708 per Lord Hodson, and at 425 and 716 per Lord Upjohn; and see *Parsons (Livestock) Ltd v Uttley Ingham & Co* [1978] QB 791, [1978] 1 All ER 525, CA.

16 See PARA 853 post.

17 See PARA 853 note 4 post.

## UPDATE

### 852 General principle: the degree of likelihood

NOTE 4--See also *Oates v Anthony Pitman & Co (a firm)* (1998) 76 P & CR 490, CA (loss of profit); *Lloyds Bank plc v Burd Pearce* [2001] All ER (D) 196 (Mar), CA (adviser, who negligently failed to supply information to another person to enable that person to decide on course of action, responsible for foreseeable consequences of information being wrong).

NOTE 14--See *Giblett v P and NE Murray Ltd* (1999) Times, 25 May, CA (foreseeability of physical injury in road traffic accident sufficient to enable recovery for a psychiatric condition); *Corr (administratrix of Corr) v IBC Vehicles Ltd* [2008] UKHL 13, [2008] 2 All ER 943 (see NEGLIGENCE vol 78 (2010) PARA 12).

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### **853. Torts other than negligence and nuisance.**

In the torts of negligence, nuisance and under the rule in *Rylands v Fletcher* it has been established that liability for damage is based on the concept of foreseeability<sup>1</sup>. It would seem that this concept should apply to most torts<sup>2</sup>. The torts of deceit and statutory liability for negligent misrepresentation under the Misrepresentation Act 1967 are in a special position in that they are subject to direct consequence rather than foreseeability<sup>3</sup>. It may be that this applies to all intentional torts<sup>4</sup>.

1 See PARA 851 text and note 1 ante, and generally paras 851-852 ante; and see TORT.

2 Although in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound* [1961] AC 388 at 426-427, [1961] 1 All ER 404 at 416, PC, there was expressly reserved the position of torts of nuisance and the so-called rule of 'strict liability' exemplified in *Rylands v Fletcher* (1868) LR 3 HL 330, in *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2)* [1967] 1 AC 617 at 639-640, [1966] 2 All ER 709 at 716-717, PC, the test of foreseeability was extended to all cases of nuisance, whether or not negligence was an ingredient, including nuisance by fumes and noise in spite of due care, and a failure to abate a nuisance as in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, [1950] 3 All ER 349, HL. The extension of foreseeability to the rule in *Rylands v Fletcher* supra and private nuisance has now been confirmed in *Cambridge Water Co v Eastern Counties Leather* [1994] 2 AC 264, [1994] 1 All ER 53, HL. See also *Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426, HL. See generally TORT. As to *Rylands v Fletcher* see NUISANCE vol 78 (2010) PARAS 147-154.

3 See PARA 1109 post. In deceit the wrongdoer is liable for all the direct consequences, whether foreseeable or not: *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, [1969] 2 All ER 119, CA; *Shelley v Paddock* [1980] QB 348, [1980] 1 All ER 1009, CA; *East v Maurer* [1991] 2 All ER 733, [1991] 1 WLR 461, CA; *Smith Kline & French Laboratories v Long* [1988] 3 All ER 887, [1989] 1 WLR 1, CA; *Smith New Court v Scrimgeour Vickers* [1997] AC 254, [1996] 4 All ER 769, HL; *Royscot Trust v Rogerson* [1991] 2 QB 297, [1991] 3 All ER 294, CA; *Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426, CA.

4 In *Smith New Court v Scrimgeour Vickers* [1997] AC 254 at 279-280, [1996] 4 All ER 769 at 789, HL, per Lord Steyn, it was suggested that the principle in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, [1969] 2 All ER 119, CA, applies to all intentional torts (see note 3 supra). If this is the case, the tortfeasor would be liable for all the consequences which follow in accordance with the physical laws known to govern the world and in accordance with, at the least, highly predictable human behaviour, until the chain is broken by human behaviour amounting to a superseding cause or by a coincidence amounting to a new cause: see PARA 857 post. This means that *Re Polemis and Furness Withy & Co Ltd* [1921] 3 KB 560, CA, relying on causation and not on foreseeability, continues to apply to fraud and statutory negligent misrepresentation and may continue to apply to all intentional torts. As to negligent misrepresentation see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 762 et seq.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(1) GENERAL PRINCIPLES/854. Causation in tort.

### 854. Causation in tort.

Subject to foreseeability and the principles of public policy<sup>1</sup>, it is prima facie both necessary and sufficient for a plaintiff to prove that a defendant's wrongdoing was a cause (and not necessarily the sole or dominant cause) of his injuries<sup>2</sup>, as a matter of physical<sup>3</sup> consequences or common sense<sup>4</sup>. Subsidiary principles associating foreseeability and causation have, however, been evolved in certain categories of concurrent or intervening causes<sup>5</sup>. The plaintiff must prove on the balance of probabilities that the defendant caused the loss or injury<sup>6</sup>. It is not enough to show that the defendant was in breach of a common law<sup>7</sup> or statutory<sup>8</sup> duty or that negligence has been admitted<sup>9</sup>. It must be shown that the breach or the admitted negligence caused the loss or injury<sup>10</sup>. Mere proof of breach does not reverse the burden of proof<sup>11</sup>.

1 As to foreseeability as the test of whether damages can be recovered see PARAS 851-853 ante. As to taking into account social or public policy in determining whether the plaintiff may recover damages in a novel situation see PARA 822 ante. See generally TORT.

2 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, [1956] 1 All ER 615, HL (pneumoconiosis caused by dust from two sources: any contribution greater than *de minimis* from a source being material); followed in *McGhee v National Coal Board* [1972] 3 All ER 1008, [1973] 1 WLR 1, HL (dermatitis); *Heskell v Continental Express* [1950] 1 All ER 1033 at 1047, 94 Sol Jo 339 per Devlin J. See generally TORT.

3 In *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1037, [1970] 2 All ER 294 at 298, HL, per Lord Reid, a distinction was drawn between a case where all the links between the carelessness and the damage are inanimate, where the damage was 'caused' by the carelessness, however unforeseeable, and a case of conscious human intervention. It was suggested that proof was easier in the former than in the latter (even in the former case, recoverability is now limited by foreseeability, but causation is factual). See further PARA 857 note 1 post. See generally TORT.

4 *Baker v Willoughby* [1970] AC 467 at 492, [1969] 3 All ER 1528 at 1532, HL, per Lord Reid (motor accident due to defendant's fault caused disability to plaintiff's leg, which was later injured by a shot gun and amputated; plaintiff entitled to full damages for first injury, although his present disability had two causes); *Grant v Sun Shipping Co Ltd* [1948] AC 549, [1948] 2 All ER 238, HL (personal injuries caused by two defendants each liable in full); *Canadian Pacific Rly Co v Kelvin Shipping Co Ltd* (1927) 138 LT 369, HL (damaged ship further damaged by third party); *Heskell v Continental Express Ltd* [1950] 1 All ER 1033, 94 Sol Jo 339; Cf *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428, [1968] 1 All ER 1068 (doctor's negligence in not giving proper treatment to man suffering from poisoning was not a cause of his death, since proper treatment could not have saved him); *Hogan v Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All ER 588, HL (if a person would have recovered from a tortious injury but for a supervening ill-judged operation, his original injury ceases to be operative; but it is otherwise if his disability would have continued under proper treatment); *Cummings (or McWilliams) v Sir William Arroll & Co Ltd* [1962] 1 All ER 623, [1962] 1 WLR 295, HL (employer's failure to provide safety belt not cause of workman's death, since he would not have worn it if provided and employers had no duty to exhort him to do so); cf *Bux v Slough Metals Ltd* [1974] 1 All ER 262, [1973] 1 WLR 1358, CA (there may be a duty to instruct); *Nolan v Dental Manufacturing Co* [1958] 2 All ER 449, [1958] 1 WLR 936; *Machray v Stewarts and Lloyds Ltd* [1964] 3 All ER 716, [1965] 1 WLR 602 (there would be liability if equipment, if supplied, would have been used. For the rule that, where the victim of a wrongdoer has already suffered injury or damage, the wrongdoer is liable only for further damage see *Baker v Willoughby* supra at 493 and 1533 per Lord Reid, and at 495 and 1535 per Lord Pearson. See also *Performance Cars Ltd v Abraham* [1962] 1 QB 33, [1961] 3 All ER 413, CA (car previously damaged); *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 452, (1997) Times, 17 January, CA, per Staughton LJ. The principles of causation are essentially the same in contract as in tort: *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137, [1994] 4 All ER 464, CA. See generally TORT.

5 See *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 452, (1997) Times, 17 January, CA, per Staughton LJ.



6 See PARAS 856-858 post. *Bonnington Castings v Wardlaw* [1956] AC 613, [1956] 1 All ER 615, HL; *Wilsher v Essex Area Health Authority* [1988] AC 1074, [1988] 1 All ER 871, HL; *Kay v Ayrshire and Arran Health Board* [1987] 2 All ER 417, HL; *Loveday v Renton* [1990] 1 Med LR 117; *Wakelin v London and South Western Rly* (1886) 12 App Cas 41, HL; *Metropolitan Rly Co v Jackson* (1877) 3 App Cas 193, HL. See generally TORT.

7 *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428, [1968] 1 All ER 1068.

8 *Bonnington Castings v Wardlaw* [1956] AC 613, [1956] 1 All ER 615, HL; *Corn v Weir's Glass* [1960] 2 All ER 300, [1960] 1 WLR 577, CA (prescribed handrail, if provided, would not have broken fall); *Norris v William Moss & Sons* [1954] 1 All ER 324, [1954] 1 WLR 346; TORT.

9 *Bolitho v City and Hackney Health Authority* [1998] AC 232 at 238, [1997] 4 All ER 771 at 775, HL, per Lord Browne-Wilkinson; *Rankine v Garton Sons & Co Ltd* [1979] 2 All ER 1185, 123 Sol Jo 305, CA.

10 *Bonnington Castings v Wardlaw* [1956] AC 613, [1956] 1 All ER 615, HL; *Wilsher v Essex Area Health Authority* [1988] AC 1074, [1988] 1 All ER 871, HL. Both foreseeability and causation must be proved: *Gaskill v Rentokil Ltd* (29 March 1994, unreported), QBD (the fact that a chemical has been used long and often without apparently causing harm tells against proof of causation in the instant case). See also TORT.

11 *Bonnington Castings v Wardlaw* [1956] AC 613, [1956] 1 All ER 615, HL; overruling *Vyner v Waldenburg Bros* [1946] KB 50, [1945] 2 All ER 547, CA. See also generally TORT.

## UPDATE

### 854 Causation in tort

NOTES--See *Wisniewski v Central Manchester Health Authority* [1998] 5 PIQR P324, CA.

NOTE 2--See *Nixon v FJ Morris Contracting Ltd* [2000] All ER (D) 2418 (no causal connection between accident and onset of symptoms of multiple sclerosis where there was no injury to spinal cord and no alteration in blood brain barrier).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(1) GENERAL PRINCIPLES/855. A two-pronged approach to causation.

### **855. A two-pronged approach to causation.**

Causation is often dealt with in two stages. At the first stage the inquiry is primarily factual and referred to as 'cause in fact' or 'but for' causation, since the question is whether the loss or injury would have occurred 'but for' the act or omission of the defendant. If it would still have occurred but for that act or omission this normally serves to exculpate the defendant<sup>1</sup>. There are difficult marginal cases. Thus it has been held that whilst it suffices to prove that the defendant materially increased the risk of harm from a known source of harm<sup>2</sup>, it does not suffice to prove that the defendant increased the number of independent sources of harm without demonstrating that the new source was causally linked to the loss or injury<sup>3</sup>.

When there are successive torts the second tortfeasor will not incur liability if making good the harm caused by the first tort also makes good that caused by the second<sup>4</sup>. If in the case of two successive torts the second tort does not eliminate the loss caused by the first, the first tortfeasor remains fully liable and the second tortfeasor will be liable for any exacerbation of the loss caused by the first<sup>5</sup>. If, when a tort has been committed and before judgment a non-tortious event occurs which eliminates an element of prospective loss, (as when serious illness occurs which would have cut short the working life of the plaintiff even if it had not already been compromised by the tort), this event, as a vicissitude of life, will negate the liability of the tortfeasor for the previously existing element of prospective loss<sup>6</sup>. If the evidence is that the negligence of the defendant has deprived the plaintiff of a less than 50 per cent chance of recovery from injury then the plaintiff will not recover damages since there is failure, on a balance of probabilities, to show that loss has been caused to him. There can be recovery in tort for loss of a chance (as there can be in contract), and Commonwealth authority holds that substantially the same principles govern both causes of action in this area<sup>7</sup>.

Another approach to loss of a chance has been to adopt a threefold classification. Cases depending on an act of the defendant are to be decided on balance of probabilities without allowance for the element of chance. Cases involving an omission by the defendant coupled with the hypothetical reaction of the plaintiff are to be similarly decided whereas in cases depending on the hypothetical reaction of a third party (whether or not combined with the action of the plaintiff) the plaintiff need only show the loss of a substantial chance, which may be less than likely, the value of which will be awarded in damages<sup>8</sup>. There may be concurrent causes of harm, in which case damages will be apportioned according to causation and blameworthiness<sup>9</sup>.

Where for example one negligently crashed vehicle remains to obstruct a highway so that later negligent drivers collide with it, there will be apportionment of damages<sup>10</sup>. In such a case an element of policy may qualify factual causation, since if a second driver deliberately or recklessly collides with a halted vehicle this will be an independent tort<sup>11</sup>.

Having resolved 'but for' causation or causation in fact and its associated problems, the court will then proceed to choose amongst those pre-conditions of the alleged tort which survive the exclusionary effects of 'but for' causation those upon which the existence or negation of liability will depend<sup>12</sup>. This is not strictly a causal inquiry but an attribution or denial of responsibility in which policy may play a significant role and for which it is not possible to provide more than guidelines. Foresight in the *Wagon Mound* sense may be an important factor<sup>13</sup>. In this process the courts also attach special significance to voluntary human action and abnormal or coincidental events, such as the operation of natural forces<sup>14</sup>. In consequence even though the defendant's act or omission may qualify under 'but for' causation as a pre-condition of the harm sustained by the plaintiff, the subsequent act or omission of another person or an extraordinary

event (*novus actus interveniens*, *nova causa interveniens*) may supersede the activity or inactivity of the defendant as the legally relevant cause (*causa causans*) and the defendant's part becomes background history, exculpating him from responsibility. These principles are discussed in the following paragraphs<sup>15</sup>.

1 *Cummings (or McWilliams) v Sir William Arrol & Co Ltd* [1962] 1 All ER 623, [1962] 1 WLR 295, HL (safety belt would not have been used if supplied); *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428, [1968] 1 All ER 1068 (poison would not have been diagnosed even if patient admitted); *The Empire Jamaica* [1957] AC 386, [1956] 3 All ER 144, HL (officer competent despite lack of certificate); *Robinson v Post Office* [1974] 2 All ER 737, [1974] 1 WLR 1176, CA (test, if administered, would not have detected allergy); *British Road Services v Arthur v Crutchley & Co Ltd* [1967] 2 All ER 792n, [1967] 1 WLR 835, CA (watchman's round, if made, would not have detected thieves); *JEB Fasteners Ltd v Marks, Bloom & Co* [1983] 1 All ER 583, CA (failure to prove reliance on negligently prepared accounts); *Leong Bee & Co v Ling Nam Rubber Works* [1970] 2 Lloyd's Rep 247, 114 Sol Jo 806, PC (fire; incompetent watchman); *Hay v Dowty Mining Equipment Ltd* [1971] 3 All ER 1136. See also *Galoo Ltd v Bright Grahame Murray (a firm)* [1995] 1 All ER 16, [1994] 1 WLR 1360, CA (failure of auditors to stop loss making companies trading merely gave occasion for but did not cause further loss); *Bank of Credit and Commerce International (Overseas) v Price Waterhouse (No 3)* (1998) Times, 2 April; *Sasea Finance Ltd v KPMG (a firm)* (1998) Times, 25 August. See also TORT.

2 *McGhee v National Coal Board* [1972] 3 All ER 1008, [1973] 1 WLR 1, HL (non-provision of washing facilities lengthened contact with harmful dust), extending *Bonnington Castings v Wardlaw* [1956] AC 613, [1956] 1 All ER 615, HL and *Nicholson v Atlas Steel Foundry and Engineering Co Ltd* [1957] 1 All ER 776, [1957] 1 All ER 776, HL (material contribution to harm enough; inhaling unspecified quantities of harmful dust).

3 *Wilsher v Essex Area Health Authority* [1988] AC 1074, [1988] 1 All ER 871, HL (excessive oxygen for baby only one of several and unrelated possible causes of injury).

4 *Performance Cars Ltd v Abraham* [1962] 1 QB 33, [1961] 3 All ER 413, CA (damage to already damaged car); cf *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1952] AC 292, [1952] 1 All ER 20, HL. See also TORT.

5 *Baker v Willoughby* [1970] AC 467, [1969] 3 All ER 1528, HL (leg injured in car accident, further injured by shot and amputated, first tortfeasor remained liable); and see TORT.

6 *Jobling v Associated Dairies Ltd* [1982] AC 794, [1981] 2 All ER 752, HL (fall at work followed, before judgment, by disabling illness); cf *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1952] AC 292, [1952] 1 All ER 20, HL (ship collision followed by storm damage, defendant not liable for latter).

7 *Hotson v East Berkshire Area Health Authority* [1987] AC 750, [1987] 1 All ER 210, CA; revsd on the question of causation [1987] AC 750, [1987] 2 All ER 909, HL (negligent delay in diagnosis deprived plaintiff of 25% chance of cure); cf *Mallett v McMonagle* [1970] AC 166 at 176, [1969] 2 All ER 178 at 190, HL, per Lord Diplock. (In dealing with the past on a balance of probabilities, anything more probable than not is treated as certain, whereas in dealing with the future or with what would have happened, the court must estimate chances and reflect that in the damages awarded). See further *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 459, (1997) Times, 17 January, CA, per Staughton LJ. See PARA 823 ante. As to recovery in contract see PARAS 962-963 post.

8 This new classification of claims for loss of a chance in *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 4 All ER 907, [1995] 1 WLR 1602, CA seemed primarily directed to contract (see PARA 962 post), but tort authorities (eg *Spring v Guardian Assurance plc* [1995] 2 AC 296, [1994] 3 All ER 129, HL, and *Davies v Taylor* [1974] AC 207, [1972] 3 All ER 836, HL) were referred to and it has been applied to negligent misrepresentation (*First Interstate Bank of California v Cohen Arnold* [1996] PNL 17, (1995) Times, 11 December, CA) and to patent infringement (*Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 459, (1997) Times, 17 January, CA, per Staughton LJ). See also *Tarrant v Ramage, The Salvital* [1998] 1 Lloyd's Rep 185 (failure to give order which would have been obeyed caused injury); applying *Joyce v Wandsworth Health Authority* [1996] 7 Med LR 1 at 20, CA, per Hobhouse LJ (plaintiff must either show relevant person would or should have taken action); *Doyle v Wallace* (1998) Times, 22 July, CA (damages in personal injury for loss of a 50% chance of becoming a teacher, distinguishing *Hotson v East Berkshire Health Authority* [1987] AC 750, [1987] 2 All ER 909, HL, and applying *Davies v Taylor* supra; *Anderson v Davis* [1993] PIQR 87, *Stovold v Barlows* [1995] NPC 154; *Allied Maples Group Ltd v Simmons & Simmons (a firm)* supra, as falling within the third category in that case. It was correct to apply a percentage for quantification. See also *Bolitho v City and Hackney Health Authority* [1998] AC 232, [1997] 4 All ER 771, HL (professional negligence standard relevant to what should have been done).

9 See PARA 856 post; and see generally the Civil Liability (Contribution) Act 1978; and PARA 837 et seq ante. See also *Stapley v Gypsum Mines Ltd* [1953] AC 663, [1953] 2 All ER 478, HL (80%/20%); cf *ICI v Shatwell*

[1965] AC 656, [1964] 2 All ER 999, HL (no liability, volens); *SS Singleton Abbey v SS Paludina* [1927] AC 16, HL (causation broken); *The Miraflores v George Livanos* [1967] 1 AC 826, [1967] 1 All ER 672 HL (three ship collision: 40%, 40%, 20%); *The Calliope* [1970] P 172, [1970] 2 WLR 991 (ship collision: 55%/45% agreed for first part, 771/2%/221/2% for later events); *Rouse v Squires* [1973] QB 889, [1973] 2 All ER 903, CA (lorry negligently crashed, later lorry negligently collided with it: 25%/75%); *Bray v Palmer* [1953] 2 All ER 1449, [1953] 1 WLR 1455, CA; *Baker v Market Harborough Industrial Co-operative Society* [1953] 1 WLR 1472, 97 Sol Jo 861, CA; *France v Parkinson* [1954] 1 All ER 739, [1954] 1 WLR 581, CA; *Davison v Leggett* (1969) 133 JP 440, (1969) Times, 8 May, CA; *Knight v Fellick* [1977] RTR 316, CA (in highway collisions where there is evidence of negligence but no clear evidence as to parties, the court may draw the inference that both drivers were equally to blame); cf *Cook v Lewis* (1952) 1 DLR 1 (A and B carelessly fired simultaneously, one shot hitting plaintiff; onus on defendants to exculpate themselves, otherwise both liable). See also *Smith v Cawdle Fen Cmrs* [1938] 4 All ER 64 at 67 per Du Parc J; *Fitzgerald v Lane* [1989] AC 328, [1988] 2 All ER 961, HL (contribution and contributory negligence in traffic accident); *Hill v New River Co* (1868) 9 B & S 303 (defendants negligent water jet frightens horse into excavation carelessly left by third party); *Shoreditch Corp v Bull* (1904) 90 LT 210 (negligence in road repair causes plaintiff to drive into rubbish left by wrongdoer); *Burrows v The March Gas and Coke Co* (1872) LR 7 Exch 96 (defendants negligently supplied defective pipe; explosion when third party sought leak with a candle).

10 *Rouse v Squires* [1973] QB 889, [1973] 2 All ER 903.

11 *Wright v Lodge* [1993] RTR 123, CA (second vehicle driven recklessly); *The Douglas* (1882) 7 PD 151 (sunken ship should have been avoided).

12 'In the varied web of affairs the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons': *Liesbosch Dredger v SS Edison* [1933] AC 449 at 460, HL, per Lord Wright; *Norris v William Moss & Sons Ltd* [1954] 1 All ER 324 at 327-328; [1954] 1 WLR 346 at 351, CA, per Vaisey J (folly of plaintiff, not breach of statutory duty the cause). 'It is not enough that the loss would not have occurred but for the tort; the tort must ... be, as a matter of common sense, a cause of the loss': *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 452, (1997) Times, 17 January per Staughton LJ. See also *Sasea Finance Ltd v KPMG (a firm)* (1998) Times, 25 August ('but for' test necessary but not sufficient for liability).

13 See PARAS 851-853 ante.

14 See Hart and Honoré *Causation in the Law* (2nd Edn, 1985) pp 130-131, 133-185.

15 See PARAS 856-859 post; and see *Impress (Worcester) Ltd v Rees* [1971] 2 All ER 357, 69 LGR 305, DC.

## UPDATE

### 855 A two-pronged approach to causation

NOTE 1--*Sasea Finance*, cited, affirmed in part: [2000] 1 All ER 676, CA.

NOTE 5--See *Allen v British Rail Engineering Ltd* [2001] EWCA Civ 242, [2001] ICR 942 (employee's injury due to employer's innocent conduct but subsequently aggravated by employer's negligence).

NOTE 7--The court will not speculate on a claimant's loss of life expectancy where there has been a negligent delay in diagnosis: *Gregg v Scott* [2005] UKHL 2, [2005] 2 AC 176.

NOTE 9--See *Jenkins v Holt* [1999] RTR 411, CA (both drivers in a traffic accident would have seen each other if they had exercised due care and attention, thus precluding a finding that one driver was solely liable).

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### 856. Act of the plaintiff.

The act or default of the plaintiff may serve to reduce or extinguish his damages by reason of contributory negligence<sup>1</sup> or by his failure to mitigate his damage<sup>2</sup>. There are also cases where the plaintiff is wholly disentitled to damages under the principles previously mentioned<sup>3</sup> governing the recoverability of damages<sup>4</sup>.

The plaintiff's act has no such effect if the wrongdoer has exposed him to peril and the plaintiff has not acted unreasonably in all the circumstances to avoid that peril or its consequences or his judgment has been overridden by terror, or his mistaken judgment in an emergency ought reasonably to have been foreseen by the wrongdoer, even if the plaintiff's decision turns out to be wrong<sup>5</sup>. The plaintiff will not be debarred from recovering if the wrongdoer has exposed another to peril and the plaintiff has acted reasonably in attempting a rescue of the endangered person or property<sup>6</sup>, nor if the plaintiff is under a disability in exercising judgment, as in the case of a child, and his action should have been foreseen<sup>7</sup>.

The plaintiff will likewise not be debarred if he is placed under a continuing susceptibility to further injury which eventuates without unreasonable conduct on his part<sup>8</sup>.

1 See PARA 876 post; and NEGLIGENCE vol 78 (2010) PARA 75 et seq.

2 See PARAS 1041-1044 post.

3 As to the general principles governing the measure of damages see PARA 804 et seq ante. As to the proposition that 'remoteness' is merely the corollary of these principles see PARA 852 et seq ante. As to the principle that in negligence and nuisance and probably most torts the test of liability is the foreseeability of the damage see PARAS 851-853 ante. As to causation in tort see PARA 854 ante. See also *Beoco Ltd v Alfa Laval Co* [1995] QB 137, [1994] 4 All ER 464, CA (defendant supplied defective product later destroyed by negligence of plaintiff's own engineers; defendant not liable for lost profit in period prior to destruction when repairs might have been effected); *Galoo Ltd v Bright Grahame Murray* [1995] 1 All ER 16, [1994] 1 WLR 1360, CA (failure of auditors to stop loss making companies trading merely gave occasion for, but did not cause, further losses). See also *Sasea Finance Ltd v KPMG (a firm)* (1998) Times, 25 August; *Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse (No 3)* (1998) Times, 2 April.

The plaintiff's inability to recover under the principles mentioned above may in some cases be associated with the defence of *volenti non fit injuria*, as to which see *Imperial Chemical Industries v Shatwell* [1965] AC 656 [1964] 2 All ER 999, HL (remaining in vicinity of explosives); and NEGLIGENCE vol 78 (2010) PARA 69 et seq. Payments not under legal compulsion to persons harmed by the plaintiff or for whom the plaintiff has no legal responsibility will not be recoverable: *Admiralty Comrs v SS Amerika* [1917] AC 38, HL (pensions to families of dead sailors); *Esso Petroleum v Hall Russell & Co* [1989] AC 643, [1989] 1 All ER 37, HL (voluntary payments to crofters in respect of oil pollution not recoverable).

4 *Cutler v United Dairies (London) Ltd* [1933] 2 KB 297, CA (stopping runaway horse not reasonable); *Adams v Lancashire and Yorkshire Rly Co* (1869) LR 4 CP 739 (attempting to shut carriage door unnecessary and unreasonable); *Sylvester v Chapman Ltd* (1935) 79 Sol Jo 777 (entering leopard's cage to extinguish cigarette). See also *The Flying Fish* (1865) 34 LJPM & A 113, PC; *The Glendinning* (1943) 76 Ll L Rep 86; *The Fritz Thyssen* [1968] P 261n, [1967] 3 All ER 117n, CA; *Norris v William Moss & Sons Ltd* [1954] 1 All ER 324; [1954] 1 WLR 346, CA. If the act of the plaintiff is solely responsible for putting the defendant in breach of statutory duty the plaintiff will not recover: *Ginty v Belmont Building Supplies Ltd* [1959] 1 All ER 414. If it is in part responsible for the breach, recovery will be reduced for contributory negligence: *Boyle v Kodak Ltd* [1969] 2 All ER 439, [1969] 1 WLR 661, HL. A passenger may be barred from recovery against a third party by the unreasonable act of the driver of the vehicle: *Dymond v Pearce* [1972] 1 QB 496, [1972] 1 All ER 1142, CA; *Drury v Camden Borough Council* [1972] RTR 391 (collision with a skip). It is not unreasonable to refuse an abortion when sterilisation fails: *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012, [1984] 3 All ER 1044, CA. As to assessing damages in such cases see *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651, [1992] PIQR Q50. In *McKew v Holland and Hannen and Cubitts (Scotland) Ltd* [1969] 3 All ER 1621, HL, the plaintiff was descending some stairs a few days after a minor accident, knowing that his leg was liable to give

way; there was no handrail and he did not invite available help. He fell, sustaining serious injury, and it was held that his 'unreasonable' conduct was a novus actus interveniens, and that he was not entitled to recover damages for the second accident. It was held that a defender is not liable for a consequence of a kind which is not foreseeable, but it does not follow that he is liable for every consequence which a reasonable person could foresee.

It is often easy to foresee unreasonable conduct or some other novus actus interveniens as likely; however, that does not mean that the defendant must pay for damage caused by the novus actus. Citation of authority in *McKew v Holland and Hannen and Cubitts (Scotland) Ltd* supra was scant, there being no reference to modern cases on foreseeability. Whilst that decision cannot be said to be out of congruity with the law on the act of the plaintiff it does not attempt to reconcile foreseeability with causation. Either it establishes or confirms that unreasonable conduct on the plaintiff's part is a bar to recovery; or it may be a decision on its own facts, the plaintiff's conduct being wholly unreasonable. The suggestion in *McGregor on Damages* (16th Edn, 1997) PARA 185 that *McKew v Holland and Hannen and Cubitts (Scotland) Ltd* supra might more suitably have been dealt with by applying principles of contributory negligence has much to commend it. Contrast that case with *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, [1970] 2 All ER 294, HL where the intervening act was that of a third party. Contrast also with *Boyle v Kodak Ltd* [1969] 2 All ER 439, [1969] 1 WLR 661, HL (breach of statutory duty and contributory negligence).

The plaintiff may also be found to have failed to have guarded against the results of the negligence of the defendant when this should have been done: *Lamb v Camden London Borough Council* [1981] QB 625, [1981] 2 All ER 408, CA (negligence of council caused house to be vacated and it was then damaged by squatters; council held not liable for this damage); *Ward v Cannock Chase District Council* [1986] Ch 546 [1985] 3 All ER 537 (council admitted negligence which resulted in vandals damaging house and furniture of plaintiff; council liable for house but not furniture, which plaintiff should have protected).

The defendant may be responsible for inducing suicide (*Pigney v Pointers Transport Services* [1957] 2 All ER 807, [1957] 1 WLR 1121) or suicide may be a novus actus (*Swami v Lo* (1979) 105 DLR (3d) 451; *Hyde v Tameside Area Health Authority* [1981] CLY 1854, CA), or a defendant may be liable for not preventing it (*Kirkham v Anderton* [1990] 2 QB 283, [1990] 3 All ER 246, CA; *Reeves v Metropolitan Police Comr* [1998] 2 All ER 381, [1998] 2 WLR 401, CA).

5 *Jones v Boyce* (1816) 1 Stark 493 (plaintiff jumped off runaway stagecoach); *Wilkinson v Downton* [1897] 2 QB 57; *Dulieu v White & Sons* [1901] 2 KB 669, DC; *Sayers v Harlow UDC* [1958] 2 All ER 342, [1958] 1 WLR 623, CA (plaintiff, locked in a lavatory due to defendants' negligence, attempted to climb out and was injured; she recovered damages subject to reduction for contributory negligence); *Canadian Pacific Rly Co v Kelvin Shipping Co Ltd* (1927) 138 LT 369 at 370, sub nom *The Metagama* (1927) 29 Ll L Rep 178, HL, per Lord Haldane; *The Oropesa* [1943] P 32 at 37, [1943] 1 All ER 211 at 214, CA, per Lord Wright (both shipping cases); *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, HL (breach of contract); *British School of Motoring v Simms* [1971] 1 All ER 317, [1971] 1 RTR 190; *Parkinson v Liverpool Corp'n* [1950] 1 All ER 367, [1950] WN 43, CA (but cf *Glasgow Corp'n v Sutherland* [1951] WN 111, HL); *Wooller v London Transport Board* [1976] RTR 206n, CA; *Parnell v Metropolitan Police District Receiver* [1975] 1 Lloyd's Rep 492, [1976] RTR 201, CA; cf *The Empire Squire* (1943) 169 LT 252 (shipping case; unreasonable action). For further shipping cases, where the doctrine of alternative danger is often developed in connection with contributory negligence, see *The Bywell Castle* (1879) 4 PD 219, CA; *The Highland Loch* [1912] AC 312, HL; *Admiralty Comrs v SS Volute* [1922] 1 AC 129 at 136, HL; *United States Shipping Board v Laird Lines Ltd* [1924] AC 286, HL; *The Paludina* [1927] AC 16, HL. For an analysis of the relationship of causation to contributory negligence see *The Calliope* [1970] P 172, [1970] 1 All ER 624 (second grounding caused partly by negligence of damaged ship and partly by joint negligence of both ships which caused original collision; apportionment of liability), discussed in *McGregor on Damages* (16th Edn, 1997) PARA 122. See also NEGLIGENCE vol 78 (2010) PARA 82.

6 *Haynes v Harwood* [1935] 1 KB 146, CA (police constable, under a legal duty, reasonably stopped runaway horse); *Brandon v Osborne Garrett & Co Ltd* [1924] 1 KB 548 (wife instinctively pulling husband away from falling glass); *The Gusty* [1940] P 159; *Morgan v Ayles* [1942] 1 All ER 489 (saving a child on the highway, moral duty only); *Hyett v Great Western Rly Co* [1948] 1 KB 345, [1947] 2 All ER 264, CA (rescue of property); *Ward v TE Hopkins & Sons Ltd* [1959] 3 All ER 225, [1959] 1 WLR 966, CA (doctor descended a well to rescue workmen, as foreseeable and natural consequence of defendants' negligence; maxim volenti non fit injuria did not apply, nor was there contributory negligence; 'the court should not be astute to accept criticism of the rescuer's conduct from the wrongdoer who created the danger': at 244 and 984 per Willmer LJ); *Chadwick v British Transport Commission* [1967] 2 All ER 945, [1967] 1 WLR 912 (plaintiff suffered shock after helping in train crash near his home); *Salmon v Seafarer Restaurants Ltd* [1983] 3 All ER 729, [1982] 1 WLR 1264; *Ogwo v Taylor* [1988] AC 431, [1987] 3 All ER 961, HL (liability to firemen); *D'Urso v Sanson* [1939] 4 All ER 26 (presumed duty to employer); *Frost v Chief Constable South Yorkshire Police* [1998] QB 254, [1997] 1 All ER 540, CA (liability to police officers); *Harrison v British Railways Board* [1981] 3 All ER 679 (rescuer contributorily negligent); *Crossley v Rawlinson* [1981] 3 All ER 674, [1982] 1 WLR 369 (no liability to rescuer approaching scene of accident); *Videan v British Transport Commission* [1963] 2 QB 650, [1963] 2 All ER 860, CA (defendant may owe duty to rescuer though not owing duty to person rescued). See also NEGLIGENCE vol 78 (2010) PARA 9.

7 *Lynch v Nurdin* (1841) 1 QB 29 (child climbed on cart); *Hughes v Lord Advocate* [1963] AC 837, [1963] 1 All ER 705, HL; *Cooke v Midland Great Western Rly of Ireland* [1909] AC 229, HL; *Excelsior Wire Rope Co Ltd v Callan* [1930] AC 404, HL; *Yachuck v Oliver Blais Co Ltd* [1949] AC 386 at 397, [1949] 2 All ER 150 at 154, PC (salesman induced by unconvincing lies of two children to sell petrol to one of them who used it to play and burnt himself); and see NEGLIGENCE vol 78 (2010) PARA 78.

8 *Wieland v Cyril Lord Carpets Ltd* [1969] 3 All ER 1006 (fall, causing further injury, due to earlier accident caused by defendants and treatment). It was held that it had long been recognised that injury sustained in one accident might be the cause of a subsequent injury: *Pigney v Pointers Transport Services* [1957] 1 WLR 1121, [1957] 2 All ER 807 (injuries induced suicide). See also *The City of Lincoln* (1889) 15 PD 15, CA (damage caused later stranding); and NEGLIGENCE vol 78 (2010) PARA 8.

## UPDATE

### 856 Act of the plaintiff

NOTE 3--*Sasea Finance*, cited, affirmed in part: [2000] 1 All ER 676, CA.

NOTE 4--*Reeves*, cited, affirmed in part: [1999] 3 All ER 897, HL.

NOTE 6--*Frost*, cited, reversed sub nom *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, [1999] 1 All ER 1, HL.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(1) GENERAL PRINCIPLES/857. Act of third party or operation of natural forces.

### **857. Act of third party or operation of natural forces.**

The intervention of a third party or of natural forces<sup>1</sup> does not always break the chain of causation where that intervention is foreseeable as a result of the wrongdoing<sup>2</sup>. In the case of intervention by a person incapable of mature volition, such as a child<sup>3</sup>, or by a person acting on impulse<sup>4</sup> or reasonably in defence of himself or his property or in assertion of a right<sup>5</sup>, the usual degree of foreseeability required in tort would appear to be required<sup>6</sup>; but in the case of a conscious act of human volition, at least where such an act is unlawful, the degree of likelihood required to make a defendant liable is higher<sup>7</sup>. Free, deliberate human conduct, and extraordinary natural events or coincidences, may break the chain and supersede the original fault of the defendant<sup>8</sup>.

1 An analysis of the effect upon damages of the intervention of a third party is rendered peculiarly difficult by the fact that older cases on the measure of damages which may be recovered are dominated by the principle of 'natural and probable result', whilst the general test now, in negligence, nuisance and the rule in *Rylands v Fletcher* (1868) LR 3 HL 330, is foreseeability: see generally paras 851-853 ante. Whilst '*Wagon Mound*' foreseeability (see *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound* [1961] AC 388, [1961] 1 All ER 404, PC) is thus the basic rule this must be taken subject to refinement and qualification in application.

Thus in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1037, [1970] 2 All ER 294 at 298, HL (prison officers failed to control young offenders), Lord Reid indicated that human conduct will be regarded as less easily foreseeable than mechanical causation. Even this more stringent standard for human conduct has been criticised as too lenient (see *Lamb v Camden London Borough Council* [1981] QB 625 at 644, [1981] 2 All ER 408 at 419, CA, per Oliver LJ, suggesting that in some situations courts would require 'a degree of likelihood amounting almost to inevitability' before holding the original tortfeasor liable. In this case squatters entered a house rendered uninhabitable by the negligence of the council who were held not liable for damage done by the intruders). In addition to the special situations already referred to in this paragraph it seems that a defendant will not be liable merely for providing the means or instruments with which to commit a tort: *CBS Songs Ltd v Amstrad Electronics* [1988] AC 1013, [1988] 2 All ER 484, HL (no liability for producing equipment on which pirated copies could be made).

The courts have also been reluctant to impose liability for the conduct of thieves and vandals who enter vacant property and break into or damage adjacent property: see *Smith v Littlewoods Organisation Ltd* [1987] AC 241, [1987] 1 All ER 710, HL; *P Perl (Exporters) Ltd v Camden London Borough Council* [1984] QB 342, [1983] 3 All ER 161, CA; *King v Liverpool City Council* [1986] 3 All ER 544, [1986] 1 WLR 890, CA; though non-liability may be achieved by means other than intervening cause such as duty of care. As to the duty of care see NEGLIGENCE vol 78 (2010) PARA 1 et seq.

2 *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, [1970] 2 All ER 294, HL (young offenders escaped and damaged boats in the course of escape); *Roe v Minister of Health* [1954] 2 QB 66 at 85, [1954] 2 All ER 131 at 138, CA, per Denning LJ; *Iron and Steel Holding and Realisation Agency v Compensation Appeal Tribunal* [1966] 1 All ER 769 at 775, [1966] 1 WLR 480 at 492, CA, per Winn LJ; *Stansbie v Troman* [1948] 2 KB 48, [1948] 1 All ER 599, CA; *Petrovich v Callingham* [1969] 2 Lloyd's Rep 386, 210 EG 1299; *Hosie v Arbroath Football Club* 1978 SLT 122 (crowd breaking gates); *Hale v Jennings* [1938] 1 All ER 579 (interference with fairground roundabout).

3 *Latham v R Johnson and Nephew Ltd* [1913] 1 KB 398 at 413, CA, per Hamilton LJ; *Martin v Stanborough* (1924) 41 TLR 1, CA (child removed block from parked car); *Shiffman v The Grand Priory in the British Realm of the Venerable Order of the Hospital of St John of Jerusalem* [1936] 1 All ER 557 (collapsing flag pole); *Wells v Metropolitan Water Board* [1937] 4 All ER 639 (assumption that children would open stopcock lid) but cf *Cuttress v Scaffolding (Great Britain) Ltd* [1953] 2 All ER 1075, [1953] 1 WLR 1311, CA (boy pulling over scaffolding does break causation); *Carmarthenshire County Council v Lewis* [1955] AC 549, [1955] 1 All ER 565, HL (this is a different case, since the school had a duty to prevent a four-year-old child wandering on the highway and causing an accident).



4 *Scott v Shepherd* (1773) 2 Wm Bl 892 (squib instinctively passed on by persons in crowd; plaintiff injured as last recipient); *Brandon v Osborne Garrett & Co* [1924] 1 KB 548. It is otherwise if there is time to warn: *McCann v JR McKellar (Alloys)* 1969 SC 1, HL.

5 *Clark v Chambers* (1878) 3 QBD 327; *The Oropesa* [1943] P 32, [1943] 1 All ER 211, CA (master setting off in lifeboat after collision); *Cunningham v MacGrath* [1964] IR 209 (ladders moved from pavement falling on plaintiff); *Clayards v Dethick* (1848) 12 QB 439 (horse injured using unlawfully narrowed way); *Collins v Middle Level Comrs* (1869) LR 4 CP 279 (negligently caused flooding made worse by flood defences of others).

6 See note 1 supra. In all such cases there would seem to be no reason, in logic or policy, to differentiate cases of human intervention from cases of mechanical or physical causation, especially where there is a duty to control persons under a disability, such as children. Cf *Carmarthenshire County Council v Lewis* [1955] AC 549, [1955] 1 All ER 565, HL.

7 *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, [1970] 2 All ER 294, HL; *Davies v Liverpool Corpn* [1949] 2 All ER 175, CA (passenger gave starting signal on tramcar; plaintiff, injured when tram started, recovered damages as conductor was under a duty to prevent such an occurrence. The case resembles *Home Office v Dorset Yacht Co Ltd* supra in that way); *Northwestern Utilities v London Guarantee Co* [1936] AC 108, PC (duty to guard pipeline carrying dangerous gas); *Al-Kandari v Brown* [1988] QB 665, [1988] 1 All ER 833, CA (solicitor in breach of duty to safeguard estranged spouse's passport). An auditor is under a duty to prevent the payment of an improper dividend in unusual circumstances: *Sasea Finance Ltd v KPMG (a firm)* (1998) Times, 25 August. See also *Philco Radio and Television Corpn of Great Britain Ltd v J Spurling Ltd* [1949] 2 KB 33, [1949] 2 All ER 882, CA. See also *Burrows v The March Gas and Coke Co* (1872) LR 7 Exch 96 (leaking gas pipe causes explosion); *Sharp v Avery* [1938] 4 All ER 85, CA; and *Smith v Harris* [1939] 3 All ER 960, CA (in both cases the negligence of a leading motorcyclist caused injury to pillion passenger on a following machine); *Stansbie v Troman* [1948] 2 KB 48, [1948] 1 All ER 599, CA (decorator, in breach of duty of care implied in contract, was liable for leaving door unlocked, facilitating thief's entry; here it would seem that a low degree of foreseeability was applied, but the duty was related to the very eventuality which occurred); *Petrovitch v Callingham Ltd* [1969] 2 Lloyd's Rep 386 (similar facts); *Scott's Trustees v Moss* (1889) 17 R 32, Ct of Sess (liability of defender who advertised balloon descent and caused crowd to gather and then burst into pursuer's land when the balloon descended there: 'natural and almost inevitable consequence'); see also *Barber v Penley* [1893] 2 Ch 447 (crowd for play); *R v Carlile* (1834) 6 C & P 636n (shop window display); *Tyler v Cork County Council* [1921] 2 IR 8, CA (theft by third parties of stock thrown in street by soldiers held to be the natural and probable consequence of scattering the goods); *A Prosser & Son Ltd v Levy* [1955] 3 All ER 577, [1955] 1 WLR 1224, CA; *Scholes v North London Rly Co* (1870) 21 LT 835 (no liability for damage done by crowd to garden into which defendants' railway engine had fallen); *Cobb v Great Western Rly* [1893] 1 QB 459, CA; affd [1894] AC 419, HL (robbery in train not caused by negligent overcrowding but dealt with on causation, not foresight).

In *Philco Radio and Television Corpn of Great Britain Ltd v J Spurling Ltd* supra, the defendants negligently delivered to the plaintiff's premises dangerously inflammable celluloid scrap which was ignited by a cigarette of the plaintiffs' employee and exploded. The plaintiffs were held entitled to recover on the grounds that, even if the employee's act was not merely accidental, there was no evidence that she knew the nature of the substance, and that there was no evidence that there was any intentional act on her part in setting the substance alight; if there had been such an intentional act, it seems that the plaintiffs would have been disentitled to recover, irrespective of the employee's exact motive or knowledge, because the defendants could not be expected to have foreseen her act.

For defamation, the ordinary principles of remoteness now apply, the question being whether the damage suffered by the plaintiff was a reasonably foreseeable consequence of the defamation: *Slipper v BBC* [1991] 1 QB 283, [1991] 1 All ER 165, CA; and see LIBEL AND SLANDER vol 28 (Reissue) PARA 248 et seq. See also *Rickards v Lothian* [1913] AC 263, PC; and *Crane v South Suburban Gas Co* [1916] 1 KB 33, DC (boy spilling molten lead); *Wheeler v Morris* (1915) 84 LJB 1435, CA (personal injuries); *Harnett v Bond* [1925] AC 669, HL (prolonged detention of sane person in asylums).

8 *Harnett v Bond* [1925] AC 669, HL; *Knightley v Johns* [1982] 1 All ER 851, [1982] 1 WLR 349, CA (defendant crashed car; extraordinary orders to a police officer resulted in a further crash for which the defendant was not liable); *Lamb v Camden London Borough Council* [1981] QB 625, [1981] 2 All ER 408, CA (negligence of council rendered house uninhabitable; squatters caused considerable 'outrageous' damage for which council not liable); *Ruoff v Long & Co* [1916] 1 KB 148 (soldiers taking lorry); *Ward v Cannock Chase District Council* [1986] Ch 546, [1985] 3 All ER 537 (council admitted negligence but not liable for furniture taken by vandals); *Nichols v Marsland* (1876) 2 Ex D 1, CA; (extraordinary storm); cf *Greenock Corpn v Caledonian Rly* [1917] AC 556, HL; *Lord Chesham v Chesham UDC* (1935) 79 Sol Jo 453. There may be a duty to guard against less serious storms: see *Romney Marsh (Bailiffs) v Trinity House* (1872) LR 7 Exch 247, Exch (ship negligently rendered unnavigable was thrown against and damaged a sea wall); *The San Onofre* [1922] P 243 at 248, CA, per Bankes LJ and at 253 per Scrutton LJ (coincidence; stranding not caused by earlier collision); *Carslogie Steamship Co v Royal Norwegian Government* [1952] AC 292, [1952] 1 All ER 20, HL (coincidence; storm damage not related to earlier collision). See also *Impress (Worcester) Ltd v Rees* [1971] 2 All ER 357, 69 LGR 305, DC (unknown person releasing oil into river). The question is whether the new factor superseded the act or omission of the defendant.

**UPDATE**

**857 Act of third party or operation of natural forces**

NOTE 7--*Sasea Finance*, cited, affirmed in part: [2000] 1 All ER 676, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(1) GENERAL PRINCIPLES/858. Pre-existing condition of victim and impecuniosity.

### 858. Pre-existing condition of victim and impecuniosity.

In tort, a defendant who commits a wrong must take the victim as he finds him<sup>1</sup>. It is no answer to a claim for damages to say that the victim would have suffered no or less injury if he had not had, for example, an 'eggshell' skull<sup>2</sup>. This principle survives the decisions establishing foreseeability as the test for determining whether damages are recoverable<sup>3</sup>. If, however, a chattel is destroyed by the defendant's negligence, additional working expenses incurred because the plaintiff's impecuniosity prevents him from buying a substitute chattel are not recoverable<sup>4</sup> unless, it seems, the defendant had some special knowledge of the circumstances<sup>5</sup>.

1 *Hay (or Bourhill) v Young* [1943] AC 92 at 109, [1942] 2 All ER 396 at 405, HL, per Lord Wright; *Baker v Willoughby* [1970] AC 467 at 493, [1969] 3 All ER 1528 at 1532-1533, HL, per Lord Reid. See also TORT.

2 Cf *Dulieu v White & Sons* [1901] 2 KB 669 at 679, DC, per Kennedy J. As to physical fragility see *Smith v Leech Brain & Co Ltd* [1962] 2 QB 405, [1961] 3 All ER 1159; *Warren v Scruttons* [1962] 1 Lloyd's Rep 497; *Lines v Harland & Wolff Ltd* [1966] 1 Lloyd's Rep 400; *Boom v Thomas Hubbuck & Son* [1967] 1 Lloyd's Rep 491; *Wieland v Cyril Lord Carpets Ltd* [1969] 3 All ER 1006; *Robinson v Post Office* [1974] 2 All ER 737, [1974] 1 WLR 1176, CA. There is no difference in principle between an eggshell skull and an eggshell personality: *Page v Smith* [1996] AC 155, [1995] 2 All ER 736, HL (predisposition to myalgic encephalomyelitis); *Brice v Brown* [1984] 1 All ER 997. A tortfeasor does not take the plaintiff's family as he finds it and is therefore not liable for stress induced in the plaintiff by an unreasonable parent: *McLaren v Bradstreet* (1969) 113 Sol Jo 471, CA. This has been criticised and distinguished in the case of a plaintiff who is a minor: *Nader v Urban Transit Authority* [1985] 2 NSWLR 501. See also *Malcolm v Broadhurst* [1970] 3 All ER 508 at 511 per Lane J, applying *Love v Port of London Authority* [1959] 2 Lloyd's Rep 541; *Quinn v JW Green (Painters) Ltd* [1966] 1 QB 509, [1965] 3 All ER 785, CA (loss of defective eye which could, however, have been restored to effective vision); *Constable v TF Maltby Ltd* [1955] 1 Lloyd's Rep 569. As to the proposition that liability for nervous shock depends on foreseeability of nervous shock see NEGLIGENCE vol 78 (2010) PARA 12. A wrongdoer will be liable in full to a high earner even though this fact was not known ('the shabby millionaire'): *The Arpad* [1934] P 189 at 202-203, CA, per Scrutton LJ. See also *Liesbosch Dredger v SS Edison* [1933] AC 449 at 461, HL, per Lord Wright. There will also be full liability for property damage even though the magnitude of the damage could not have been foreseen: *Vacwell Engineering Co Ltd v BDH Chemicals* [1971] 1 QB 88, [1969] 3 All ER 1681, settled on appeal [1971] 1 QB 111n, [1970] 3 All ER 553, CA. The plaintiff also takes the currency of the plaintiff as he finds it: *The Despina R* [1979] AC 685, [1979] 1 All ER 421, HL.

3 See PARA 851 ante.

4 *Liesbosch Dredger v SS Edison* [1933] AC 449, HL. The dredger *Liesbosch* was sunk due to the defendants' negligence. The owners were subject to heavy penalties if the contract was delayed. A comparable dredger could have been bought as replacement but the owners had insufficient money, so, reasonably as it was found, they hired a substitute and incurred additional working expenses, until eventually funds became available to buy a substitute. They recovered only the market price of a comparable dredger on the date of the accident, plus the notional cost of transporting it and loss until it could have been available but not their actual loss since this arose from their 'impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort': at 460 per Lord Wright.

The principle in *Liesbosch Dredger v SS Edison* supra may require reconsideration in the light of recent cases. It is difficult to reconcile with the principle that the defendant takes the plaintiff as he finds him in financial as well as physical and psychological terms. It is in conflict with rules for mitigation and in contract. It will not be applied when the impecuniosity was caused by the defendant (*Jarvis v Richards & Co* (1980) 124 Sol Jo 793), nor where repairs were delayed and increased in cost not merely because of impecuniosity but in the exercise of commercial judgment until liability for compensation was resolved (*Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433, CA), and in two vehicle cases (see *Martindale v Duncan* [1973] 2 All ER 355, [1973] 1 WLR 574, CA; *Mattocks v Mann* [1993] RTR 13, (1992) Times, 19 June, CA) where repairs were delayed until insurance monies were available. In the latter, it was indicated that only when the sole cause was impecuniosity would *Liesbosch Dredger v SS Edison* supra be applied. In *Perry v Sidney Phillips & Son* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA, it was distinguished either on the ground that impecuniosity was not the sole cause, or because the loss being foreseeable was not too remote, as it was in *Liesbosch*.

*Dredger v SS Edison* supra. This distinction was also used in *Archer v Brown* [1985] QB 401, [1984] 2 All ER 267 but *Liesbosch Dredger v SS Edison* supra was applied in *Ramwade Ltd v WJ Emson & Co Ltd* [1987] RTR 72, (1986) 130 Sol Jo 804, CA. It has not been applied in contract (*Muhammad Issa El Sheikh Ahmad v Ali* [1947] AC 414, PC; *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA), provided remoteness was satisfied, even though in *Monarch Steamship Co Ltd v Karlshamns Oljefabriker AB* [1949] AC 196, [1949] 1 All ER 1, HL, Lord Wright said there was no difference between tort and contract. In *Clippens Oil Co Ltd v Edinburgh and District Water Trustees* [1907] AC 291 at 303, HL, Lord Collins had said that impecuniosity restricting mitigation should not reduce the damages and some cases such as *Robbins of Putney Ltd v Meek* [1971] RTR 345 which might appear to fall within *Liesbosch Dredger v SS Edison* supra have been dealt with as cases in mitigation.

5 *Paris v Stepney Borough Council* [1951] AC 367, [1951] 1 All ER 42, HL, indicates that particular knowledge on the part of the tortfeasor would increase his liability. This occurs in cases of breach of contract: *Muhammad Issa El Sheikh Ahmad v Ali* [1947] AC 414, PC; *Monarch Steamship Co Ltd v Karlshamns Oljefabriker AB* [1949] AC 196 at 225, [1949] 1 All ER 1 at 14, HL, per Lord Wright; *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(1) GENERAL PRINCIPLES/859. Mitigation in tort.

### 859. Mitigation in tort.

The requirement that a plaintiff should take reasonable steps<sup>1</sup> to mitigate his loss<sup>2</sup> applies in tort<sup>3</sup> as it does in contract<sup>4</sup>, though it has been more fully developed in contract, and the basic principles are common to both fields<sup>5</sup>. Thus in personal injuries the plaintiff should accept recommended medical treatment which does not involve a substantial degree of risk<sup>6</sup> and if the injuries result in loss of employment he should undertake reasonably similar work if he is able to do so<sup>7</sup>. If a damaged chattel is not of unique character<sup>8</sup> the plaintiff will not recover for repairs more expensive than are necessary to restore it to the condition of a commercial equivalent and, if repairs are not feasible, he will only recover the price of a commercial equivalent<sup>9</sup>. If, after the commission of a tort, the defendant reasonably offers the plaintiff assistance which would reduce the loss, this should be accepted<sup>10</sup>. The plaintiff is not required to abandon or prejudice his rights or property<sup>11</sup>, to risk money speculatively<sup>12</sup>, to engage in uncertain litigation against third parties<sup>13</sup>, to endanger his commercial reputation<sup>14</sup> or to cause loss or injury to third parties<sup>15</sup>. A woman who has undergone unsuccessful sterilisation need not undergo an abortion<sup>16</sup>. Reasonable expenses incurred to minimise loss will be recoverable, even if they in fact increase it<sup>17</sup> but if steps taken to mitigate loss eliminate it, this will negate the plaintiff's claim<sup>18</sup>. Such steps taken by a plaintiff must form part of a continuous course of action flowing from the original transaction<sup>19</sup>. Steps taken before the tort which obviate or reduce its effects, such as insurance, are not taken into account<sup>20</sup>. Impecuniosity<sup>21</sup> and ignorance<sup>22</sup> may excuse a plaintiff from taking action which would otherwise reduce his loss but payments following from the tort and made by the plaintiff to third parties but not under legal obligation will not be recoverable<sup>23</sup>. It appears that it is for the defendant to prove that the plaintiff has acted unreasonably, not for the plaintiff to prove that he has acted reasonably<sup>24</sup>.

1 Whether there is need to mitigate is a question of law; whether the steps taken are reasonably sufficient is a question of fact: *Payzu Ltd v Saunders* [1919] 2 KB 581 at 588, CA, per Bankes LJ and at 589 per Scrutton LJ; *The Soholt* [1983] 1 Lloyd's Rep 605 at 608, Sol Jo 305, CA, per Sir John Donaldson MR.

2 Failure to mitigate results in the plaintiff only recovering for what would have been the mitigated loss: *Jones v Watney, Combe, Reid & Co Ltd* (1912) 28 TLR 399 at 400 per Lush J; *Payzu Ltd v Saunders* [1919] 2 KB 581 at 589, CA, per Scrutton LJ; *The Soholt* [1983] 1 Lloyd's Rep 605 at 608, Sol Jo 305, CA, per Sir John Donaldson MR.

3 *Admiralty Comrs v SS Chekiang* [1926] AC 637 at 646, HL, per Lord Sumner; *Admiralty Comrs v SS Susquehanna, The Susquehanna* [1926] AC 655 at 663, HL, per Lord Sumner; *The Liverpool (No 2)* [1960] 1 All ER 465 at 474, [1959] 2 Lloyd's Rep 611 at 624 per Lord Merriman P (revsd on other grounds [1963] P 64, [1960] 3 All ER 307, CA).

4 As to mitigation in contract see PARAS 1041-1043 post.

5 Although the plaintiff must act reasonably in the interests of both parties, the standard expected is not high since the defendant is a wrongdoer: *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 at 506, HL, per Lord Macmillan; *Harlow and Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep 509 at 530 per Roskill J; *Moore v DER Ltd* [1971] 3 All ER 517, [1971] 1 WLR 1476, CA; *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397; *London and South of England Building Society v Stone* [1983] 3 All ER 105, [1983] 1 WLR 1242, CA; *Gebruder Metalman & Co v NBR (London) Ltd* [1984] 1 Lloyd's Rep 614, (1984) 81 LS Gaz 515, CA; *Hayes v James and Charles Dodd (a firm)* [1990] 2 All ER 815, CA.

6 *McAuley v London Transport Executive* [1957] 2 Lloyd's Rep 500, CA; *Marcroft v Scruttons Ltd* [1954] 1 Lloyd's Rep 395, CA; *Morgan v T Wallis* [1974] 1 Lloyd's Rep 165; *Selvanayagam v University of the West Indies* [1983] 1 All ER 824, [1983] 1 WLR 585, PC. Workmen's compensation cases may provide guidance, eg as to when there is a conflict of medical opinion: see *Tulton v Majestic* [1909] 2 KB 54; *Walsh v Lock* (1913) 110 LT 452; *Fife Coal Co v Cant* (1920) 124 LT 545, HL; *Steele v Robert George & Co Ltd* [1942] AC 497, [1942] 1 All ER

447, HL; *Richardson v Redpath Brown & Co Ltd* [1944] AC 62, [1944] 1 All ER 110, HL (preference for own doctor's opinion reasonable); but cf *Fyfe v Fife Coal Co* (1927) 138 LT 65 at 67, HL, per Lord Dunedin (not necessarily reasonable). See also *Savage v T Wallis Ltd* [1966] 1 Lloyd's Rep 357, 116 New LJ 837, CA. There is a considerable body of authority on this topic in Australia: see eg *Glavonjic v Foster* [1979] VR 536; *Karabotsos v Plastex* [1981] VR 675; *Fazlic v Milingimbi Community Inc* (1982) 38 ALR 424 (which relied on *Selvanayagam v University of the West Indies* supra). See further *James v Woodall Duckham Construction Co* [1969] 2 All ER 794, [1969] 1 WLR 903, CA; *Lines v Harland & Wolf Ltd* [1966] 2 Lloyd's Rep 400 (delay in proceedings a failure to mitigate).

7 *Potter v Arafa* [1994] PIQR Q73, CA. Cf *Sarti v Nederlandsche Houtimport Maatschappij* [1968] 2 Lloyds' Rep 135 (not unreasonable for plaintiff to have delayed return to work and then to have taken lower paid dock work).

8 If the chattel is unique, expensive repairs will be justified: *O'Grady v Westminster Scaffolding Ltd* [1962] 2 Lloyd's Rep 238 (unique car). The unique character may not be intrinsic to the chattel but may result from the difficulty of obtaining a substitute or the need for immediate availability: *Algeiba v Australind* (1921) 8 Ll LR 210. If a valuable chattel has been damaged or destroyed the hire of an equivalent will be reasonable: *Moore v DER Ltd* [1971] 3 All ER 517, [1971] 1 WLR 1476, CA; *HL Motorworks v Alwahbi* [1977] RTR 276, CA; *Mattocks v Mann* [1993] RTR 13, (1992) Times, 19 June, CA (cars). Where the only solution is the purchase of replacements, this will be allowed unless the result would be absurd: *Dominion Mosaics and Tile Co v Trafalgar Trucking Co* [1990] 2 All ER 246, [1989] 22 EG 101, CA; *Uctkos v Mazzetta* [1956] 1 Lloyd's Rep 209.

9 *Darbishire v Warran* [1963] 3 All ER 310, [1963] 1 WLR 1067, CA (car). On the hire of unduly expensive replacements see *Watson Norie v Shaw & Nelson* [1967] 1 Lloyd's Rep 515, CA. Repairs may be too expensive because the plaintiff made a bad bargain: *The Pactolus* (1856) Swab 173 at 175-176 per Dr Lushington.

10 *Anderson v Hoen, The Flying Fish* (1865) 3 Moo PC N 577 (collision at sea).

11 *Elliott Steam Tug Co v Shipping Controller* [1922] 1 KB 127 at 140, CA, per Scrutton LJ.

12 *Jewelowski v Propp* [1944] KB 510.

13 *Pilkington v Wood* [1953] Ch 770, [1953] 2 All ER 810.

14 *London and South of England Building Society v Stone* [1983] 3 All ER 105, [1983] 1 WLR 1242, CA; *James Finlay & Co v NV Kwik Hoo Tong Handel Maatschappij* [1929] 1 KB 400, CA.

15 *Banco de Portugal v Waterlow & Sons* [1932] AC 452 at 471, HL, per Lord Sankey.

16 *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012, [1984] 3 All ER 1044, CA.

17 *Lloyds and Scottish Finance v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 QB 764, [1964] 2 All ER 732; *Esso Petroleum Co v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA; *British Motor Trade Association v Salvadori* [1949] Ch 556, [1949] 1 All ER 208; *Dee Conservancy Board v McConnell* [1928] 2 KB 159, CA; *The World Beauty* [1970] P 144, [1968] 3 All ER 158, CA; *Jones v Watney, Combe, Reid & Co* (1912) 28 TLR 399 (unsuccessful attempt to resume normal function after injury).

18 *British Westinghouse Co v Underground Electric Rlys* [1912] AC 673, HL; *Bellingham v Dhillon* [1973] QB 304, [1973] 1 All ER 20.

19 *Gardner v Marsh & Parsons (a firm)* [1997] 3 All ER 871, [1997] 1 WLR 489, CA; *British Westinghouse Co v Underground Electric Rlys* [1912] AC 673 at 690-691, HL, per Lord Haldane; *British Transport Commission v Gourley* [1956] AC 185 at 214, [1955] 3 All ER 796, HL, per Lord Reid; *Salih v Enfield Health Authority* [1991] 3 All ER 400, CA; *Hussey v Eels* [1990] 2 QB 227, [1990] 1 All ER 449, CA.

20 *Bradburn v Great Western Rly* (1874) LR 10 Exch 1; *Smoker v London Fire and Civil Defence Authority* [1991] 2 AC 502, [1991] 2 All ER 449, HL.

21 *Clippens Oil Co Ltd v Edinburgh and District Water Trustees* [1907] AC 291 at 303, HL, per Lord Collins, distinguished and approved in *Leisbosch Dredger v SS Edison* [1933] AC 449 at 461, HL, per Lord Wright. See also *Robbins of Putney Ltd v Meek* [1971] RTR 345; *Martindale v Duncan* [1973] 2 All ER 355, [1973] 1 WLR 574, CA; *Bunclark v Hertfordshire County Council* [1977] 2 EGLR 114; *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433, CA.

22 *Eley v Bedford* [1972] 1 QB 155, [1971] 3 All ER 285.

23 *Admiralty Comrs v SS Amerika* [1917] AC 38, HL (pensions to families of dead sailors); *Esso Petroleum v Hall Russell* [1989] AC 643, [1989] 1 All ER 37, HL (voluntary payments to crofters in respect of oil pollution).

24 The opinion to the contrary in *Selvanayagam v University of the West Indies* [1983] 1 All ER 824, [1983] 1 WLR 585, PC, is opposed to prior and subsequent authority: see *Roper v Johnson* (1873) LR 8 CP 167; *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130n, [1967] 2 All ER 353, HL; *London and South of England Building Society v Stone* [1983] 3 All ER 105, [1983] 1 WLR 1242, CA; *Gebruder Metelman GmbH & Co KG v NBR (London) Ltd* [1984] 1 Lloyd's Rep 614 at 631 per Sir John Donaldson MR; *Richardson v Redpath Brown & Co Ltd* [1944] AC 62, [1944] 1 All ER 110, HL.

## UPDATE

### 859 Mitigation in tort

NOTE 3--The same test applies in fraud cases: *Standard Chartered Bank v Pakistan National Shipping Corp*n [2001] EWCA Civ 55, [2001] 1 All ER (Comm) 822.

NOTE 6--*Selvanayagam*, cited, not followed *Geest plc v Lansiquot* [2002] UKPC 48, [2003] All ER 383n, [2002] 1 WLR 3111.

NOTE 10--The innocent victim of a car accident is not obliged to accept the offer of a replacement vehicle from the insurers of the driver at fault where the insurers have not demonstrated that it will be cheaper than the alternative the victim intends to use: *Copley v Lawn; Maden v Haller* [2009] EWCA Civ 580, [2009] Lloyd's Rep IR 496, [2009] All ER (D) 173 (Jun).

NOTE 19--*Gardner v Marsh & Parsons* and *Hussey v Eels*, cited, applied in *Needler Financial Services v Taber* [2001] All ER (D) 434 (Jul).

NOTE 24--See *Geest plc v Lansiquot* NOTE 6.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(2) CASES OTHER THAN PERSONAL INJURY/(i) Torts involving Chattels/860. Trespass to chattels.

## (2) CASES OTHER THAN PERSONAL INJURY

### (i) Torts involving Chattels

#### 860. Trespass to chattels.

A trespass to chattels is actionable without proof of actual damage<sup>1</sup>, and a plaintiff is at least entitled to nominal damages<sup>2</sup> for any unauthorised<sup>3</sup> direct physical interference with chattels in his possession<sup>4</sup>.

Where the goods have been destroyed or taken permanently from him, the measure of damages is their value<sup>5</sup>, and where the goods still exist and have been restored to him but have depreciated in value, the measure of damages is the extent to which they have depreciated<sup>6</sup>.

Damages may, it seems, be awarded for injury to a trader's reputation caused by an illegal seizure of his goods under a false and pretended claim of right<sup>7</sup>. The wrongful taking of a chattel may be followed by a wrongful keeping amounting to a conversion<sup>8</sup>, and where the taking was itself not wrongful, and therefore was not a trespass, the detention may be<sup>9</sup>. Whether the action is trespass<sup>10</sup> or conversion<sup>11</sup>, the principles<sup>12</sup> upon which damages for the wrongful deprivation of chattels are to be assessed are the same<sup>13</sup>.

1 See *Rogers v Spence* (1844) 13 M & W 571 at 581 per Lord Denman CJ, Ex Ch (affd on point of pleading (1846) 12 Cl & Fin 700, HL); *Sanderson v Marsden and Jones* (1922) 10 Ll LR 467 at 472, CA, per Atkin LJ; *Doss v Doss* (1866) 14 LT 646 at 648, PC; *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204 at 214-215 per Latham CJ; cf *Everitt v Martin* [1953] NZLR 298. In *William Leitch & Co v Leydon* [1931] AC 90 at 106, HL, the question was left open, but very minor damage or asportation suffices: *Fouldes v Willoughby* (1841) 8 M & W 540 at 549 per Alderson B; *Price v Helyar* (1828) 4 Bing 597 at 604 per Best CJ.

2 *Kirk v Gregory* (1876) 1 ExD 55.

3 When property on or adjoining the highway is damaged the plaintiff must prove negligence: *Holmes v Mather* (1875) LR 10 Exch 261 at 268 per Bramwell B; *River Wear Comrs v Adamson* (1877) 2 App Cas 743 at 767, HL, per Lord Blackburn. Absence of negligence (or inevitable accident) is generally a defence: *National Coal Board v JE Evans & Co (Cardiff) Ltd* [1951] 2 KB 861, [1951] 2 All ER 310, CA. It is not clear how far, if at all, *Letang v Cooper* [1965] 1 QB 232 [1964] 2 All ER 929, CA, confining trespass to the person to intentional conduct and requiring other harm to be remedied in negligence applies to trespass to goods. See *Colwill v Reeves* (1811) 2 Camp 575; and TORT.

4 *Isaack v Clark* (1615) 2 Bulst 306 at 312; cf *Ward v Macauley* (1791) 4 Term Rep 489; but see *Slater v Swan* (1730) 2 Stra 872 (beating plaintiff's horse not actionable without proof of special damage when reasonable force in exercise of self-help was in question). The trespass may also be a conversion: see *Fouldes v Willoughby* (1841) 8 M & W 540 at 548, per Alderson B; and TORT.

5 As to cases where the plaintiff has a limited interest in the chattel see PARA 867 post. The value of the chattel is a question of fact, but a libellous picture may have no value beyond that of the paint and canvas: *Du Bost v Beresford* (1810) 2 Camp 511. As to property used for an illegal purpose see also *Cameron v Wynch* (1846) 2 Car & Kir 264. As to mitigation of damage see PARA 859 ante. As to minerals abstracted by underground trespass see PARA 870 note 10 post; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 38. At common law a plaintiff with a limited interest, if deprived of possession, could be awarded the full value of the chattel subject to a duty to account over. The Torts (Interference with Goods) Act 1977 s 8 now provides that a defendant is entitled to show that a third party has a better right than the plaintiff. A plaintiff may be required to give particulars of his title, identify any person claiming an interest and authorise the defendant to apply for directions as to the joinder of these persons. If these provisions are not or cannot be complied with,



the common law as in *Wilson v Lombank*[1963] 1 All ER 740, [1963] 1 WLR 1294 will apply. As to aggravated damages see PARAS 811 ante, 1148 post.

6 This may well coincide with the cost of repair; but in cases where the repair cost is higher than the diminution in value, the repair cost may be awarded provided that it is a reasonable course to adopt in the circumstances: see PARA 864 post; cf *Ruxley Electronics v Forsyth*[1996] AC 344, [1995] 3 All ER 268, HL.

7 *Brewer v Dew* (1843) 11 M & W 625; *Smith v Enright* (1893) 63 LJQB 220, DC (replevin); but see contra *Dixon v Calcraft*[1892] 1 QB 458 at 464, CA, per Lord Esher MR, and at 446 per Lopes LJ (statutory compensation for loss or damage for detention of a ship without reasonable and probable cause); cf *Dixon v Calcraft* supra at 465 per Fry LJ. See also *Lonrho plc v Fayed (No 5)* [1994] 1 All ER 188, [1993] 1 WLR 1489, CA. As to wrongful distress see generally DISTRESS vol 13 (2007 Reissue) PARA 1076 et seq.

8 *Fouldes v Willoughby* (1841) 8 M & W 540 at 547 per Lord Abinger (conversion depends upon the defendant's presumed intention).

9 *Howard E Perry & Co Ltd v British Railways Board*[1980] 2 All ER 579, [1980] 1 WLR 1375.

10 See generally TORT. Where a wrongdoer seizes and sells a chattel, the person in possession may waive the tort and sue for money had and received: see *Oughton v Seppings* (1830) 1 B & Ad 241; and RESTITUTION vol 40(1) (2007 Reissue) PARAS 161-164; TORT.

11 See generally TORT.

12 See generally TORT. In an action for replevin either party may on succeeding obtain damages, and where the plaintiff succeeds the damages for the initial wrongful seizure, together with any special damage laid, may be recovered as in trespass; this recovery will therefore bar any further action in trespass for the wrongful taking: see *Gibbs v Cruikshank*(1873) LR 8 CP 454; and DISTRESS vol 13 (2007 Reissue) PARAS 1081-1082, 1087.

13 *The Mediana*[1900] AC 113 at 117-118, HL, per Lord Halsbury LC. As to damages for temporary deprivation, loss of use or loss of profits see PARAS 863-864 post.

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### **861. Conversion etc.**

In actions for conversion the measure of damages is ordinarily the value of the goods at the date of conversion, and this is dealt with elsewhere in this work<sup>1</sup>.

Detinue has been abolished by statute as an independent tort<sup>2</sup> but an action now lies in conversion for loss or destruction of goods which a bailee has allowed to occur in breach of duty to the bailor, thus covering the case which previously would have been detinue but was not also covered by conversion<sup>3</sup>. Provision is made for the form of judgment when goods are detained, and remedies for what was formerly detinue and conversion<sup>4</sup> are assimilated. There is flexibility in regard to the date on which the value of goods detained is to be assessed, one factor being the consideration that in detinue it was the date of judgment<sup>5</sup>.

1 See generally TORT. Since the abolition of detinue as a separate tort and its inclusion within conversion by the Torts (Interference with Goods) Act 1977 s 2, whilst the date of conversion remains normal for irreversible conversion, there will be greater flexibility in regard to wrongful detention. As to factors to be taken into account in applying this see *IBL Ltd v Coussens* [1991] 2 All ER 133 at 139-140, CA, per Neill LJ. As to conversion by a bailee see BAILMENT vol 3(1) (2005 Reissue) PARA 85. If the tortfeasor improves the chattels after conversion or their value increases, valuing at the date of conversion gives him the increase in value. If an improvement was made before conversion, whether in good faith or not, at common law the expenditure could be recovered: *Munro v Willmott* [1949] 1 KB 295, [1948] 2 All ER 893; *Greenwood v Bennett* [1973] QB 195, [1972] 3 All ER 586, CA. The Torts (Interference with Goods) Act 1977 s 6 now provides that an improver in good faith may have an allowance of the increased value and this is also available to further buyers in good faith. It is unclear whether the common law rules survive. See generally TORT.

2 See the Torts (Interference with Goods) Act 1977 s 2(1); and TORT.

3 See *ibid* s 2(2); and TORT.

4 See *ibid* s 3; and TORT.

5 *IBL Ltd v Coussens* [1991] 2 All ER 133 at 139-140, CA, per Neill LJ. Other factors include the abolition of detinue, the assimilation of remedies for detinue and conversion, the fact that after conversion values may fluctuate and the fact that in irreversible conversion the date of conversion might be departed from if, with commercial goods, the price of replacement had risen. See *Brandeis Goldschmidt & Co v Western Transport Ltd* [1981] QB 864, [1982] 1 All ER 28, CA (nominal damages because plaintiffs required goods for use and would not have sold to take advantage of market fluctuation); cf *BBMB Finance (Hong Kong) v Eda Holdings* [1991] 2 All ER 129, [1990] 1 WLR 409, PC.

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### **862. Damage to chattels; in general.**

Where chattels have been damaged or destroyed by conduct which constitutes a tort, the measure of damages depends on the general principles set out earlier in this title, and on the particular rules set out below and in succeeding paragraphs<sup>1</sup>.

The basic rule is that the measure of damages in the case of damage to a chattel is the cost of repair<sup>2</sup>, but if it is unreasonable from a business point of view to repair the article<sup>3</sup>, or if the article is damaged beyond repair<sup>4</sup>, then the basic measure is the cost of replacement in an available market. If there is no available market and it is reasonable to take steps to have a substitute made, the cost of the substitute may provide the measure of damages<sup>5</sup>; if there is no market and the making of a substitute is unreasonable, it would seem that the measure of damages is the value to the plaintiff at the time of the loss<sup>6</sup>.

Special circumstances displacing the market measure need not be intrinsic to the chattel but may result from the difficulty of obtaining a substitute or an urgent need for the chattel<sup>7</sup>. Excessive expense in repairs may result from a bad bargain with the repairer even though the work itself is reasonable<sup>8</sup>. Repairs should be such as are required to restore the former condition of the chattel, not an improvement on that condition<sup>9</sup>. If the plaintiff effects the repairs, expenses and overheads which would not otherwise have been incurred may be included in the claim<sup>10</sup>, but not if they would have been incurred in any event<sup>11</sup>. If partial repairs are effected, the cost of these can be recovered, together with damages to cover the harm not made good<sup>12</sup>. The fact that repairs have not been effected by the time of the trial<sup>13</sup>, or that they are never carried out<sup>14</sup>, is no obstacle to an award of damages based on an estimate. Unreasonable delay in effecting repairs which results in an increase in costs will be a failure to mitigate, but delay resulting from the need to wait for the approval of insurers<sup>15</sup>, for payment of insurance monies<sup>16</sup>, or for the resolution of liability, has not been held to be unreasonable<sup>17</sup>. Wasted expenses and standing charges can also be recovered<sup>18</sup>, as can insurance excess and no claims bonus<sup>19</sup>.

If an article is repaired, but its value is still less than its pre-accident value, the difference may be recovered<sup>20</sup>. No deduction is to be made from damages if there is necessary betterment due to repair<sup>21</sup>. If the defendant damages an already damaged chattel, and repairs required for the original damage also make good the secondary damage, the defendant does not incur liability<sup>22</sup>.

1 See PARAS 863-866 post.

2 *The Bernina* (1886) 55 LT 781; *The London Corpn* [1935] P 70 at 77, CA, per Greer LJ; *Darbishire v Warran* [1963] 3 All ER 310, [1963] 1 WLR 1067, CA (in which it was reaffirmed that the rule is the same at common law as in Admiralty), citing *Admiralty Comrs v SS Susquehanna, The Susquehanna* [1926] AC 655 at 661, HL, per Viscount Dunedin; see also *The Argentino* (1888) 13 PD 191 at 201, CA, per Bowen LJ; *The Kingsway* [1918] P 344 at 356, CA, per Pickford LJ; *The Hebridean Coast* [1960] 2 All ER 85 at 94, [1960] 3 WLR 29 at 40-41, CA, per Devlin LJ (affd [1961] AC 545, [1961] 1 All ER 82, HL).

3 *Darbishire v Warran* [1963] 3 All ER 310, [1963] 1 WLR 1067, CA, where the plaintiff chose to repair an 11-year-old car at a cost of £192, although the market price of a comparable car (not necessarily of the same make) was £85. It was held that this was unreasonable conduct as between plaintiff and defendant, the matter apparently being put as a principle of measure of damages as well as an aspect of mitigation of damage; but since the car was unusually well-maintained its market value was taken to be higher than an ordinary substitute. As to contract see *Ruxley Electronics v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL; cf *Italian State Rlys v Minnehaha* (1921) 6 Ll L Rep 12 at 13, CA, per Lord Sterndale MR. Contrast *O'Grady v Westminster*

*Scaffolding Ltd* [1962] 2 Lloyd's Rep 238 (unique vehicle: cost of repairs recovered). It appears from the explanations in *Darbishire v Warran* supra at 313 and 1072 per Harman LJ, at 317 and 1077-1078 per Pearson LJ, and at 318 and 1074 per Pennycuik J, that the decision in *O'Grady v Westminster Scaffolding Ltd* supra was an application of the rule in a case where there was no available market in which to purchase an unusual article.

4 '[The measure of damages was] the value of the ship to her owner as a going concern': *Liesbosch Dredger v SS Edison* [1933] AC 449 at 463, HL, per Lord Wright, which connotes the recovery of other expenses connected with replacement: *Darbishire v Warran* [1963] 1 All ER 310, [1963] 1 WLR 1067, CA. See also PARA 863 post; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 822 et seq.

5 *J and E Hall Ltd v Barclay* [1937] 3 All ER 620, CA. See also *Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246, [1989] 22 EG 101, CA (damages to reflect market price of replacement machinery, not the discount price at which the plaintiffs had acquired the original machinery. When the only way of replacing destroyed machinery was buying new, the measure of damages was the cost of doing so unless the result would be absurd). See also *Uctkos v Mazzetta* [1956] 1 Lloyd's Rep 209 (unusual speedboat).

6 This residual proposition is little more than a restatement of basic principle, but in a case such as *O'Grady v Westminster Scaffolding Ltd* [1962] 2 Lloyd's Rep 238, if repair was quite impracticable, such a principle could be relied upon to award more than the 'ordinary' market value.

7 *Algeiba v Australind* (1921) 8 Ll L Rep 210.

8 *The Pactolus* (1856) Swab 173 at 175-176 per Dr Lushington.

9 *The Pactolus* (1856) Swab 173.

10 *London Transport Executive v Foy, Morgan & Co* [1955] CLY 743; *South Wales Electricity plc v DMR Ltd* [1997] 4 CL 210.

11 *London Transport Executive v Court* [1954] CLY 888.

12 *The Georgiana v The Anglican* (1872) 21 WR 280.

13 *The Kingsway* [1918] P 344, CA.

14 *The Glenfinlas* [1918] P 363n (ship lost before trial); approved in *The York* [1929] P 178 at 184-185, CA, per Scrutton LJ; *The London Corpn* [1935] P 70, CA.

15 *Martindale v Duncan* [1973] 2 All ER 355, [1973] 1 WLR 574, CA.

16 *Mattocks v Mann* [1993] RTR 13, (1992) Times, 19 June, CA (delay by a reputable but overworked repairer did not displace mitigation).

17 *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433, CA.

18 *HMS Inflexible* (1857) Swab 200; *The City of Peking* (1890) 15 App Cas 438, PC; *Handcock v Ernesto* [1952] 1 Lloyd's Rep 467, CA; *Liesbosch Dredger v SS Edison* [1933] AC 449 at 468-469, HL, per Lord Wright; *The Black Prince* (1862) Lush 568.

19 *Ironfield v Eastern Gas Board* [1964] 1 All ER 544n, [1964] 1 WLR 1125.

20 *The Greta Holme* [1897] AC 596, HL; cf *The Georgiana v The Anglican* (1872) 21 WR 280. See also *Cooper v Kirby (Harboro)* [1972] CLY 810. If it were proved in a particular case that a motor car, even though it had been fully repaired after an accident, nevertheless had a lower market value than it would have had if it had never been in an accident, it seems that the diminution in market value would be recoverable: see *Payton v Brooks* [1974] RTR 169, CA.

21 This is the common law rule, incorporated into shipping law in *The Gazelle* (1844) 2 Wm Rob 279; *The Pactolus* (1856) Swab 173; *The Munster* (1896) 12 TLR 264; *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397. As to the similar rule where the measure of damages in the case of injury to land is the cost of reinstatement see PARA 867 post.

22 *Performance Cars v Abraham* [1962] 1 QB 33, [1961] 3 All ER 413, CA.

## UPDATE

### 862 Damage to chattels; in general

NOTE 2--If an innocent claimant's impecuniosity means that he has to avail himself of the services of a credit hire company whilst his car is being repaired, so that the expense he incurs in procuring a substitute vehicle is greater than ordinary car hire, those costs are recoverable: *Lagden v O'Connor* [2003] UKHL 64, [2004] 2 All ER 277.

NOTE 5--See *Derby Resources AG v Blue Corinth Marine Co Ltd (The Athenian Harmony)* [1998] 2 Lloyd's Law Rep 410 (the relevance of an available market, where goods are damaged, is to provide evidence of their monetary value, both in their sound and damaged condition; it can only be said that there is no available market if the only evidence of market prices is at such different times and places as to be so remote from the actual place and time of delivery to be of no probative value). The full market value of a chattel which has been destroyed is to be assessed on the evidence of each particular case: *Ali Reza-Delta Transport Co Ltd v United Arab Shipping Co SAG (No 1)* [2003] EWCA Civ 684, [2003] 2 All ER (Comm) 269.

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### **863. Loss of use of profit-earning chattel which is destroyed.**

The measure is the value of the chattel to the owner as a going concern at the time and place of loss<sup>1</sup> so that he might be in a position to purchase a replacement. Loss of user profit for a period until a replacement could be obtained may also be awarded, together with costs arising from the disturbance of any current engagement, the costs of adapting, transporting and insuring any replacement and wasted wages and standing charges<sup>2</sup>. Interest may be awarded on the total sum<sup>3</sup>.

The value of prospective future earnings of the lost chattel cannot be merely added to the market value, since the earning capacity of the chattel will have been taken into account in arriving at its capitalised value and mere addition would result in duplication<sup>4</sup>. Loss of profit on an engagement current at the time of loss<sup>5</sup>, future engagements already contracted<sup>6</sup> and assured future engagements of predictable value<sup>7</sup> have been allowed, but not virtually certain future engagements of speculative value<sup>8</sup>.

The cost of an exact replacement will not be allowed if the special character of the lost chattel would make this unreasonably expensive and a cheaper replacement would suffice<sup>9</sup>. In this context destruction does not mean annihilation; it is enough if the chattel is so badly damaged that repair is uneconomic<sup>10</sup>.

At common law a plaintiff with a limited interest, such as a bailee, could recover the full value of the chattel, subject to a duty to account<sup>11</sup>. Statute now provides that a defendant may require the plaintiff to give particulars of his title and effect the joinder of other parties<sup>12</sup>. If these provisions are not complied with, the common law still prevails.

1 *Liesbosch Dredger v SS Edison* [1933] AC 449 at 464, HL, per Lord Wright.

2 *Liesbosch Dredger v SS Edison* [1933] AC 449 at 468-469, HL, per Lord Wright. As to the hire of a replacement see *Moore v DER* [1971] 3 All ER 517, [1971] 1 WLR 1476, CA; *Mattocks v Mann* [1993] RTR 13, CA.

3 *Liesbosch Dredger v SS Edison* [1933] AC 449 at 469, HL, per Lord Wright. As to interest in Admiralty see *The Kong Magnus* [1891] P 223; *The Gertrude* (1888) 13 PD 105, CA; *The Berwickshire* [1950] P 204. As to interest generally see PARAS 848-850 ante.

4 *Liesbosch Dredger v SS Edison* [1933] AC 449 at 464, HL.

5 *The Llanover* [1947] P 80; *The Kate* [1899] P 165.

6 *The Philadelphia* [1917] P 101, CA; *The Racine* [1906] P 273, CA; *The Empress of Britain* (1913) 29 TLR 423.

7 *The Fortunity* [1960] 2 All ER 64, [1961] 1 WLR 351.

8 *The Llanover* [1947] P 80. This may result in under compensation since there is no compensation for profits lost before a replacement is obtained. See Knott 'Loss of profit caused by total loss of ship; its relationship to value and interest' [1993] LMCLQ 502.

9 *Uctkos v Mazzetta* [1956] 1 Lloyd's Rep 209; *Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246, CA.

10 *Italian State Rlys v Minnehaha* (1921) 6 Ll L Rep 12, CA. Causation must be established. *Beoco v Alfa Laval Co* [1995] QB 137, [1994] 4 All ER 464, CA (negligent testing by the plaintiff's engineers of defective machinery supplied by defendants caused explosion).

11 *The Winkfield* [1902] P 42, CA. However, if one party with a limited interest sues another only the value of the limited interest can be recovered: *Brierly v Kendall* (1852) 17 QB 937; *Toms v Wilson* (1862) 4 B & S 442, Ex Ch; *Sedgeworth v Overend* (1797) 7 Term Rep 279; *Addison v Overend* (1796) 6 Term Rep 766. If a bailor settles for full value, the bailee cannot sue, though the bailor may be under a duty to account to the bailee: *O'Sullivan v Williams* [1992] 3 All ER 385, [1992] RTR 402, CA. See generally para 860 ante; and TORT.

12 See the Torts (Interference with Goods Act) 1977 s 8. See generally para 860 ante; and TORT.

## UPDATE

### 863 Loss of use of profit-earning chattel which is destroyed

NOTE 9--As to circumstances in which the cost of replacement is inappropriate, see *Southampton Container Terminals Ltd v Hansa Schiffahrts GmbH* [2001] 2 Lloyd's Rep 275, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(2) CASES OTHER THAN PERSONAL INJURY/(i) Torts involving Chattels/864. Loss of use of profit-earning chattel which is damaged.

#### **864. Loss of use of profit-earning chattel which is damaged.**

The plaintiff is entitled to the diminution in value of the chattel, normally measured by the cost of repairs<sup>1</sup>, at a time when it was reasonable to effect the repairs<sup>2</sup>. If the chattel is so damaged that it is unreasonable to carry out the repairs undertaken because the cost would significantly exceed the value of the chattel in its damaged state, and it is neither exceptional nor irreplaceable, then only such sum as would cover repairs to bring it to the condition of a reasonable replacement will be allowed<sup>3</sup>. If the chattel is not readily replaceable and is specially suited to the requirements of its trade then more expensive repairs may be allowed<sup>4</sup>.

The market value will be used to assess damages even though the chattel had been acquired at a discount price<sup>5</sup>.

There may be recovery in respect of average profits which would have been earned but for the chattel not being available during a reasonable period for repair<sup>6</sup>. Alternatively, a sum for the reasonable hire of a substitute may be allowed<sup>7</sup>. Not only lost current engagements but also future engagements which cannot be fulfilled will be compensated<sup>8</sup>.

If the chattel, though of a profit-earning type, was being operated unprofitably to establish a new trade<sup>9</sup>, or because of legal restrictions<sup>10</sup>, or because the plaintiff had hired it from a third party at a charge exceeding profits earned<sup>11</sup>, this will reduce or eliminate compensation for loss of profit. Conversely if the plaintiff hires and operates a substitute so efficiently as to make a greater profit than with his own chattel this additional element must be set off against damages<sup>12</sup>. If no profit earning time is lost because the chattel is destroyed by an independent cause before being repaired<sup>13</sup> or it is offered for sale by the plaintiff and repairs are carried out when it is withdrawn from service for inspection<sup>14</sup> there will be no award for loss of profit.

If damage caused by the defendant requires the chattel to be withdrawn from use for repair and the opportunity is taken to carry out other work on the chattel which did not need to be carried out at that time this will not affect damages<sup>15</sup>. If the defendant causes damage necessitating repair and the chattel is then further damaged by independent natural causes also necessitating repair and the two sets of repairs are carried out simultaneously the tort will not be regarded as having caused loss of profit<sup>16</sup>.

If the chattel is damaged by two successive torts committed by different tortfeasors, such that each set of damage requires withdrawal for repairs, then the first tortfeasor will be liable for loss of profits<sup>17</sup>. If the chattel is similarly damaged by two successive torts and repairs required by the first tort necessarily make good damage caused by the second then the second tortfeasor will be treated as having caused no loss and so be free of all liability<sup>18</sup>. Standing charges and expenses wasted because of loss of earning time resulting from a tort will be recoverable<sup>19</sup>.

1 *The London Corpn* [1935] P 70 at 75-79, CA, per Greer LJ. But see *Payton v Brooks* [1974] RTR 169 at 176, CA, per Roskill LJ indicating that other heads of damage may also be available.

2 *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433, CA.

3 *Italian State Rlys v Minnehaha* (1921) 6 Ll L Rep 12, CA.

4 *Algeiba v Australind* (1921) 8 Ll L Rep 210.

5 *Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246, CA.



6 *The Argentino* (1888) 13 PD 191 at 201, CA, per Bowen LJ (affd (1889) 14 App Cas 519 at 523, HL, per Lord Herschell); *The Kingsway* [1918] P 344, CA; *The Kate* [1899] P 165; *Admiralty Comrs v SS Valeria* [1922] 2 AC 242; *The Clarence* (1850) 3 Wm Rob 283; *HMS Inflexible* (1857) Sw 200 at 205 per Dr Lushington. Cf *The Black Prince* (1862) Lush 568 at 574-575; *Dixons (Scholar Green) Ltd v JL Cooper Ltd* (1970) 114 Sol Jo 319, CA (substantial damages for articulated lorry out of use for 11 weeks without specific proof of loss).

7 This must be pleaded and proved: *SS Strathfillan v SS Ikala* [1929] AC 196, HL; *The Hebridean Coast* [1961] AC 545, [1961] 1 All ER 82, HL. See also *Moore v DER* [1971] 3 All ER 517, [1971] 1 WLR 1476, CA; *Mattocks v Mann* [1993] RTR 13, 1992 Times, 19 June, CA; *Macrae v Swindells* [1954] 2 All ER 260, [1954] 1 WLR 597 (plaintiff's employee damaged substitute car lent by defendant; plaintiff entitled to hire of further car).

8 *The Argentino* (1889) 14 App Cas 519 at 523-524, HL, per Lord Herschell; *The Risoluto* (1883) 8 PD 109; *The Star of India* (1876) 1 PD 466; *The Soya* [1956] 2 All ER 393, [1956] 1 WLR 714, CA; *The Pacific Concord* [1961] 1 All ER 106, [1961] 1 WLR 873; *The World Beauty* [1970] P 144, [1969] 3 All ER 158, CA; *The Naxos* [1972] 1 Lloyd's Rep 149.

9 *The Bodlewell* [1907] P 286. Similar principles apply if a contract is performed by a sister ship: *The City of Peking* (1890) 15 App Cas 438, PC.

10 *SS Strathfillan v SS Ikala* [1929] AC 196, HL.

11 *Admiralty Comrs v SS Valeria* [1922] 2 AC 242. The authorities on non-profit earning ships were distinguished on the ground that those ships were not designed to earn profits.

12 *The World Beauty* [1969] P 12, [1968] 2 All ER 673; revsd in part but not on this point [1970] P 144, [1969] 3 All ER 158, CA.

13 *The Glenfinlas* [1918] P 363n; *Beoco v Alfa Laval Co* [1995] QB 137, [1994] 4 All ER 464, CA (negligent testing by plaintiff's engineer of defective machinery supplied by defendant caused explosion).

14 *The York* [1929] P 178, CA.

15 *The Acanthus* [1902] P 17; *Admiralty Comrs v SS Chekiang* [1926] AC 637, HL; *The Ferdinand Retzlaff* [1972] 2 Lloyd's Rep 120.

16 *Carslogie Steamship Co v Royal Norwegian Government* [1952] AC 292, [1952] 1 All ER 20, HL.

17 *Carslogie Steamship Co v Royal Norwegian Government* [1952] AC 292, [1952] 1 All ER 20, HL; approving the decision in *The Haversham Grange* [1905] P 307, CA.

18 *Performance Cars v Abraham* [1962] 1 QB 33, [1961] 3 All ER 413, CA.

19 See note 2 supra.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(2) CASES OTHER THAN PERSONAL INJURY/(i) Torts involving Chattels/865. Loss of use of non profit-earning chattel.

### **865. Loss of use of non profit-earning chattel.**

In the case of a chattel which is not employed for private gain, the plaintiff is entitled to general damages for loss of use<sup>1</sup>. Where a public authority employs a chattel for public purposes it will usually be entitled to substantial and not merely nominal damages for loss of use<sup>2</sup>. There is no rule of thumb covering the assessment of damages in all cases, but where a substitute is reasonably hired the damages may be the cost of hire<sup>3</sup>; where a standby is kept and actually used, then a figure representing the cost of keeping the standby, both running costs and capital expenditure, may be taken<sup>4</sup>; in other cases damages may be calculated on the basis of a percentage of the capital value of the chattel when the damage was inflicted or the detention commenced<sup>5</sup>. A private individual is entitled to general damages for inconvenience due to loss of use of a chattel such as a motor car<sup>6</sup>.

Damages for loss of use are not, in general, recoverable unless the loss of use is consequential on some wrongful damage to a chattel<sup>7</sup>.

1 *The Mediana* [1900] AC 113, HL (lightship).

2 *The Mediana* [1900] AC 113, HL; *The Greta Holme* [1897] AC 596, HL (dredger); *The Marpessa* [1907] AC 241, HL (dredger); *The Astrakhan* [1910] P 172 (Danish warship); *Admiralty Comrs v SS Chekiang* [1926] AC 637, HL (British warship); *Admiralty Comrs v SS Susquehanna, The Susquehanna* [1926] AC 655, HL (Admiralty oil tanker); *Birmingham Corp v Sowsbery* (1969) 113 Sol Jo 877 (omnibus; application of decisions in shipping cases to a collision on land).

3 See the cases cited in note 2 supra.

4 *Admiralty Comrs v SS Susquehanna, The Susquehanna* [1926] AC 655, HL.

5 *The Greta Holme* [1897] AC 596, HL; *Admiralty Comrs v SS Chekiang* [1926] AC 637, HL (where it was held that there is no absolute rule for calculating damages); *Admiralty Comrs v SS Susquehanna, The Susquehanna* [1926] AC 655, HL; cf *The Hebridean Coast* [1961] AC 545, [1961] 1 All ER 82, HL; *Birmingham Corp v Sowsbery* (1969) 113 Sol Jo 877; and see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 832 et seq.

6 The shipping and omnibus cases are not applied to private cars where compensation is normally on the basis of actual loss and inconvenience: see *Alexander v Rolls Royce Motor Cars Ltd* [1996] RTR 95 at 102, (1995) Times, 4 May, CA, per Beldam LJ; such damages are regularly awarded in the county court; the cost of hire of a substitute vehicle may provide the measure of damages. If the defendant provides a substitute, in general no damages are recoverable: *Macrae v Swindells* [1954] 2 All ER 260, [1954] 1 WLR 597. As to hire of substitute cars see also *Watson Norie Ltd v Shaw* (1967) 111 Sol Jo 117, sub nom *Watson Norie v Shaw and Nelson* [1967] 1 Lloyd's Rep 515, CA; *Moore v DER* [1971] 3 All ER 517, [1971] 1 WLR 1476, CA; *HL Motorworks v Alwahabi* [1977] RTR 276, CA; *Daily Office Cleaning Contractors v Shefford* [1977] RTR 361; *Mattocks v Mann* [1993] RTR 13, (1992) Times, 19 June, CA.

7 Thus if there is no actionable wrong in relation to a chattel, even though the plaintiff may be deprived of its use, there is no cause of action: see *National Coal Board v JE Evans & Co (Cardiff) Ltd* [1951] 2 KB 861, [1951] 2 All ER 310, CA (inevitable accident); *Mouse's Case* [1608] 12 Co Rep 63 (jettison); *Dewey v White* (1827) Mood & M 56 (necessity); *Société Anonyme de Remorquage à Hélice v Bennetts* [1911] 1 KB 243 (ship under tow sunk; tug could not recover for economic loss).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(2) CASES OTHER THAN PERSONAL INJURY/(i) Torts involving Chattels/866. Further damage.

**866. Further damage.**

Further damage, beyond the prima facie measure, may be included in the damage for which the plaintiff can recover, if it is within the requirement of foreseeability in the particular circumstances of the case and otherwise within the general principles of recoverability<sup>1</sup>.

<sup>1</sup> See PARAS 851-853 ante. See also *Payton v Brooks* [1974] RTR 169 at 176, CA, per Roskill LJ; *British Motor Trade Association v Salvadori* [1949] Ch 556, [1949] 1 All ER 208 (expenses of inquiries and detection of tort).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(2) CASES OTHER THAN PERSONAL INJURY/(i) Torts involving Chattels/867. Limited interests in chattels.

### **867. Limited interests in chattels.**

If a bailee or a person holding goods under a lien sues a stranger for trespass to the goods, the defendant may show, in accordance with rules of court, that a third party has a better right than the plaintiff to all or part of the chattels<sup>1</sup>. The plaintiff may be required to give particulars of his title, to identify any person who has a claim to the goods and to authorise the defendant to apply for directions as to the joinder of these persons<sup>2</sup>. If these provisions are not or cannot be followed he may recover damages as if he were the owner, but must account to the owner for what he recovers beyond the value of his own interest<sup>3</sup>. A judgment in trespass obtained by a bailee of goods is a bar to an action by the bailor or owner<sup>4</sup>. Where the plaintiff has a limited interest in the chattel, however, and the residue of the interest is in the defendant, damages for trespass to the chattel are limited to the value of the plaintiff's interest<sup>5</sup>.

The owner of a chattel with no present right to possession, as where the chattel is bailed to another for a fixed time, may sue for a permanent injury to it whether the injury is caused by trespass, conversion or negligence<sup>6</sup>. If the chattel is bailed at will so that the bailor can recall it at any time then either the bailor or the bailee may sue for any injury to it<sup>7</sup>.

1 See the Torts (Interference with Goods) Act 1977 s 8(1). See also BAILMENT vol 3(1) (2005 Reissue) PARA 89; TORT. As to lien generally see LIEN.

2 See *ibid* s 8(2); RSC Ord 15 r 10A; and CIVIL PROCEDURE.

3 See BAILMENT vol 3(1) (2005 Reissue) PARA 90; and see *Hepburn v A Tomlinson Hauliers Ltd* [1966] AC 451, [1966] 1 All ER 418, HL.

4 *The Winkfield* [1902] P 42 at 61, CA, per Collins MR; *O'Sullivan v Williams* [1992] 3 All ER 385, [1992] RTR 402, CA.

5 *Brierly v Kendall* (1852) 17 QB 937; *Toms v Wilson* (1862) 4 B & S 442, Ex Ch.

6 *Mears v London and South Western Rly Co* (1862) 11 CBNS 850; *Moukattaf v BOAC* [1967] 1 Lloyd's Rep 396; cf *Tancred v Allgood* (1859) 4 H & N 438 at 444 per Pollock CB. The measure of damages in this action is the damage to the reversionary interest, not the value of the chattel. *Lancashire Waggon Co v Fitzhugh* (1861) 6 H & N 502 (injury to reversion). See further BAILMENT vol 3(1) (2005 Reissue) PARA 88. But the injury must be suffered by the claimant in his capacity as the reversionary owner: *Candlewood Navigation Corp'n Ltd v Mitsui OSK Lines Ltd, The Mineral Transporter* [1986] AC 1, [1985] 2 All ER 935, PC.

7 *Lotan v Cross* (1810) 2 Camp 464; *Nicolls v Bastard* (1835) 2 Cr M & R 659.

### **UPDATE**

### **867 Limited interests in chattels**

TEXT AND NOTE 2--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(2) CASES OTHER THAN PERSONAL INJURY/(ii) Injury to Land/868. Injury to land; general principles.

## (ii) Injury to Land

### 868. Injury to land; general principles.

The prima facie measure of damages for all torts affecting land is the diminution in value to the plaintiff or, in the case of a plaintiff in possession with full ownership, the cost of reasonable reinstatement<sup>1</sup>. In the latter case no deduction falls to be made merely because the plaintiff gets 'new for old', that is to say a betterment which is the necessary result of reinstatement<sup>2</sup>. In addition, consequential loss of profits may be recovered in accordance with general principles<sup>3</sup> and, in the case of a private individual, such consequential loss as a necessary stay in a hotel, and general damages for inconvenience<sup>4</sup>.

1 For many years the diminution in value was thought to be the sole test in all cases: see *Jefferson v Jefferson* (1683) 3 Lev 130 at 131; *Jesser v Gifford* (1767) 4 Burr 2141 at 2142; *Lukin v Godsall* (1795) Peake Add Cas 15; *Evelyn v Raddish* (1817) Holt NP 543; *Dodd v Holme* (1834) 1 Ad & El 493; *Jones v Gooday* (1841) 8 M & W 146; *Hide v Thornborough* (1846) 2 Car & Kir 250; *Hosking v Phillips* (1848) 3 Exch 168; *Johnstone v Hall* (1856) 2 K & J 414 at 420 per Sir Page Wood VC; *Murphy v Wexford County Council* [1921] 2 IR 230, CA; *Moss v Christchurch RDC* [1925] 2 KB 750. Cf *Philips v Ward* [1956] 1 All ER 874, [1956] 1 WLR 471, CA, where a surveyor negligently and in breach of contract failed to discover defects in a house, and the measure of damages was held to be the diminution in value, not the cost of repair. See also *Gardner v Marsh and Parsons* [1997] 3 All ER 871, [1997] 1 WLR 489, CA (defective tenanted flat negligently surveyed; measure of damages held to be the difference between the market value without the defects and with the defects at date of purchase; action by the plaintiff did not affect damages unless it flowed inexorably from the original transaction and was part of a continuous course of dealing).

On analysis all such cases (other than *Philips v Ward* supra, which was strictly an action in contract) turn either on the limited nature of the plaintiff's interest or on the unreasonableness of reinstatement. Hence in *Hollebone v Midhurst and Fernhurst Builders and Eastman and White of Midhurst Ltd* [1968] 1 Lloyd's Rep 38, the official referee awarded the cost of reinstatement where it was reasonable for the plaintiff to reinstate and continue to live in his private house rather than accept a sum for diminution in value, sell and seek another house. This decision was approved in *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225, CA (factory rebuilt after destruction by fire; cost of reinstatement recovered, not difference in value before and after the fire). Although the latter case was strictly a case of breach of contract, its application to tort cannot be doubted. See also *Nitro-Phosphate and Odam's Chemical Manure Co v London and St Katharine Docks Co* (1878) 9 ChD 503 at 520, CA, per Fry LJ; but see *Taylor (CR) Wholesale Ltd v Hepworths Ltd* [1977] 2 All ER 784, [1977] 1 WLR 659; and *Hole & Son (Sayers Common) Ltd v Harrisons of Thurnscoe Ltd* [1973] 1 Lloyd's Rep 345, 116 Sol Jo 922, county court, where the plaintiffs intended, before the accident, to demolish and rebuild, and were held entitled to damages only in respect of temporary repairs and loss of rent. See also TORT.

2 *Hollebone v Midhurst and Fernhurst Builders and Eastman and White of Midhurst Ltd* [1968] 1 Lloyd's Rep 38, 118 NLJ 156; *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225, CA. Cf *Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246, CA. In *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* supra, it was held that, had the defendants shown that the plaintiffs, in rebuilding their factory with a different and more convenient layout, had spent more than they would have spent in rebuilding it to the old plan, and if the planning authority would have allowed it to be rebuilt on the old lines, the defendants would have been entitled to claim that the excess spent should be deducted from the damages.

3 For an example of the usual practice see *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225, CA.

4 This accords with general principle and practice.

## UPDATE

### **868 Injury to land; general principles**

NOTE 4--Where a solicitor negligently fails to procure a good title on a conveyance for a client, the client is not required to give credit, in an assessment of loss, for the benefit of occupying the property if such benefit does not stem from the breach complained of: *Hinc v Warren Rees & Co (a firm)* [2002] 17 EG 157 (CS), CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(2) CASES OTHER THAN PERSONAL INJURY/(ii) Injury to Land/869. Injury to reversionary interests in or damage to land.

### **869. Injury to reversionary interests in or damage to land.**

A reversioner is entitled to recover damages for trespass to the land<sup>1</sup> in which he has an interest only when his reversionary right has been injured, and this arises only when the injury is of such a permanent character as to affect the property after it falls into his possession<sup>2</sup>. When the trespass continues, however, until the plaintiff has acquired an interest in possession, he may sue for any injury so caused<sup>3</sup>. When the plaintiff has only an interest in reversion the measure of damages for injury to the land is the injury to the reversion<sup>4</sup>. This is estimated by considering the depreciation of the selling value of the reversionary interest<sup>5</sup>. As against his own lessee a reversioner may recover damages for trespass in the nature of waste<sup>6</sup>, even though the injury is not of a permanent character, if it tends to weaken the evidence of his title<sup>7</sup>.

1 Cf as to nuisance *Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 684, HL; and NUISANCE.

2 *Baxter v Taylor* (1832) 5 B & Ad 72; *Twyman v Knowles* (1853) 13 CB 222; *Simpson v Savage* (1856) 1 CBNS 347; *Mumford v Oxford, Worcester and Wolverhampton Rly Co* (1856) 1 H & N 34, all approved in *Rust v Victoria Graving Dock Co and London and St Katharine Dock Co* (1887) 36 ChD 113 at 135, CA, per Lindley LJ; *Mayfair Property Co v Johnston* [1894] 1 Ch 508 (encroaching foundations); cf *Tancred v Allgood* (1859) 4 H & N 438; and see NUISANCE vol 78 (2010) PARA 228; TORT.

3 *Konskier v B Goodman Ltd* [1928] 2 KB 421, CA.

4 *Whitham v Kershaw* (1886) 16 QBD 613, CA.

5 *Johnstone v Hall* (1856) 2 K & J 414; cf *Dobson v Blackmore* (1847) 9 QB 991; *Jefferson v Jefferson* (1683) 3 Lev 130 at 131; *Jesser v Gifford* (1767) 4 Burr 2141 at 2142; *Evelyn v Raddish* (1817) Holt NP 543. See also *Bedingfield v Onslow* (1685) 3 Lev 209 (reversioner entitled to value of cut timber, tenant recovering for shack, shelter and fruit); *Hosking v Phillips* (1848) 3 Exch 168; *Moss v Christchurch RDC* [1925] 2 KB 750, DC (diminution in market value); *Mayfair Property Co v Johnston* [1894] 1 Ch 508 (cost of reinstatement); *Rust v Victoria Graving Dock Co* (1887) 36 ChD 113 (no fall in value of ground rents since no regular market for these proved; for buildings subject to mortgage the sum necessary to reinstate them as good security; nor will there be compensation for nuisance causing merely temporary harm to the reversion or for apprehension of recurrence of a nuisance). See further NUISANCE vol 78 (2010) PARA 228.

6 As to damages for waste see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 435.

7 *Young v Spencer* (1829) 10 B & C 145 at 152 per Lord Tenterden CJ, where a new trial was ordered for the jury to find whether the opening of a new door might occasion a confusion of boundary and so affect evidence of title. This was a special and an extreme case however: see *Baxter v Taylor* (1832) 4 B & Ad 72 at 76 per Parke B; *Johnstone v Hall* (1856) 2 K & J 414 at 420 per Wood VC; cf *Espir v Basil Street Hotel Ltd* [1936] 3 All ER 91, CA (tenant's breach of covenant not to make alterations).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(2) CASES OTHER THAN PERSONAL INJURY/(ii) Injury to Land/870. Trespass to land; loss and damage.

### **870. Trespass to land; loss and damage.**

A plaintiff is entitled to nominal damages for trespass to land even if no loss or damage is caused<sup>1</sup>. If damage or loss is caused substantial damages may be recovered, and the plaintiff is entitled to the diminution in the value of the land which may be the cost of repair and reinstatement<sup>2</sup>. Where that cost exceeds the diminution in the market value of the land, the award of the higher figure will depend on reinstatement being reasonable<sup>3</sup>. In calculating diminution in value the court may take into account the potential of the property<sup>4</sup> and the fact that the loss or damage has reduced or eliminated costs of redevelopment (as by destroying buildings awaiting demolition<sup>5</sup>). An increase in the cost of repairs resulting from a decision in the exercise of commercial judgment to postpone repairs until an award of damages is assured will not prevent damages being assessed as at the time when repairs could reasonably be carried out<sup>6</sup>. In an appropriate case the purchase price of substitute property, at least where this is cheaper than full reinstatement and assists mitigation, may be awarded<sup>7</sup>. Where fixtures are severed the plaintiff may either claim in trespass for them as fixtures<sup>8</sup> or in conversion for them as chattels<sup>9</sup>.

Where there has been trespassory mining a distinction is drawn. If the defendant did not know there was trespass, the plaintiff may claim the value of the mineral in the seam, the pithead value less the cost of mining and raising it<sup>10</sup>. If the defendant trespassed knowingly, the plaintiff is entitled to the full pithead value, without any deduction for the costs of severance and raising<sup>11</sup>. Damages may be recovered for other disturbance caused by the mining<sup>12</sup>. Consequential losses may be claimed<sup>13</sup> and exemplary and aggravated damages may be available<sup>14</sup>. If there is a continuing trespass a fresh cause of action will accrue from day to day until it is discontinued<sup>15</sup>. There will be no deduction for betterment as a result of the fact that a successful plaintiff may have an improved property<sup>16</sup>. The plaintiff must prove an interest in the property subject to the trespass<sup>17</sup>.

1 *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA. See further TORT.

2 *Hollebone v Midhurst and Fernhurst Builders and Eastman and White of Midhurst Ltd* [1968] 1 Lloyd's Rep 38, 118 NLJ 156; approved in *Harbutt's Plasticine v Wayne Tank and Pump Co* [1970] 1 QB 447, [1970] 1 All ER 225, CA; distinguishing *Jones v Goody* (1841) 8 M & W 146, which denied higher reinstatement costs, on the ground that there the damage was slight.

3 *Hollebone v Midhurst and Fernhurst Builders and Eastman and White of Midhurst Ltd* [1968] 1 Lloyd's Rep 38, 118 NLJ 156; *Ward v Cannock Chase District Council* [1986] Ch 546, [1985] 3 All ER 537; *Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246, CA; *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433. See also *Lodge Holes Colliery Co v Wednesbury Corp* [1908] AC 323, HL, allowing less than full reinstatement. As to cases where reinstatement was not allowed because it would not be effected see *Hole & Sons (Sayers Common) v Harrisons of Thurnscoe* [1973] 1 Lloyd's Rep 345, 116 Sol Jo 922; *Taylor (CR) (Wholesale) Ltd v Hepworths Ltd* [1977] 2 All ER 784, [1977] 1 WLR 659; *Farmer Giles v Wessex Water Authority* [1990] 1 EGLR 177, CA. In the last three cases redevelopment was in view.

4 *Farmer Giles v Wessex Water Authority* [1990] 1 EGLR 177 at 179, CA.

5 *Taylor (CR) (Wholesale) Ltd v Hepworths Ltd* [1977] 2 All ER 784, [1977] 1 WLR 659.

6 *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433, CA.

7 *Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246, CA.



8 *Thompson v Pettitt* (1847) 10 QB 101.

9 *Clarke v Holford* (1848) 2 Car & Kir 540.

10 *Martin v Porter* (1839) 5 M & W 351 as qualified in *Wood v Morewood* (1841) 3 QB 440n; *Jegon v Vivian* (1871) 6 Ch App 742; approved in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25; *Re United Merthyr Collieries Co* (1872) LR 15 Eq 46; *Townend v Askern Coal Co* [1934] 1 Ch 463. It is uncertain whether severing minerals would constitute an 'improvement' qualifying for an allowance under the Torts (Interference with Goods) Act 1977 s 6. See further MINES, MINERALS AND QUARRIES.

11 *Martin v Porter* (1839) 5 M & W 351; *Phillips v Homfray* (1871) 6 Ch App 770; *Trotter v Maclean* (1879) 13 ChD 574.

12 *Morgan v Powell* (1842) 3 QB 278; *Jegon v Vivian* (1871) 6 Ch App 742; *Phillips v Homfray* (1871) 6 Ch App 770; *Ecclesiastical Comrs v North Eastern Rly* (1877) 4 ChD 845; *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25.

13 *Bisney v Swanston* (1972) 225 EG 2299, CA (loss of profits); *Huxley v Berg* (1815) 1 Stark 98 (illness of wife); *Davis v Bromley UDC* (1903) 67 JP 275, CA; *Pritchard v Long* (1842) 9 M & W 666; but see *Bracegirdle v Orford* (1813) 2 M & S 77 and *Lonrho plc v Fayed (No 5)* [1994] 1 All ER 188, [1993] 1 WLR 1489, CA (injury to reputation may not be covered).

14 This is subject to the general rules governing the recovery of these damages: see PARA 1111 et seq post.

15 *Maberley v Peabody & Co of London Ltd* [1946] 2 All ER 192 at 194 per Stable J.

16 *Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246, CA; *Harbutt's Plasticine Co v Wayne Tank and Pump Co* [1970] 1 QB 447, [1970] 1 All ER 225, CA; *Hollebone v Midhurst and Fernhurst Builders and Eastman and White of Midhurst Ltd* [1968] 1 Lloyd's Rep 38; *Lukin v Godsall* (1795) Peake Add Cas 15; *Hide v Thornborough* (1846) 2 Car & Kir 250.

17 *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL; *National Provincial Bank v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472, HL; *Marcroft Wagons Ltd v Smith* [1951] 2 KB 496 at 501, [1951] 2 All ER 271 at 274, CA, per Evershed MR; *Brown v Brash and Ambrose* [1948] 2 KB 247, [1948] 1 All ER 922, CA; *Eastern Construction Co v National Trust Co* [1914] AC 197, PC (mere possessor); *Portland Managements Ltd v Harte* [1977] QB 306, [1976] 1 All ER 225, CA; *Browne v Dawson* (1840) 12 Ad & El 624; *McPhail v Persons Unknown* [1973] Ch 447, [1973] 3 All ER 393, CA (when trespasser may acquire possession); *Delaney v TP Smith* [1946] KB 393, [1946] 2 All ER 23, CA (no right against true owner); *Barnett v Guildford* (1855) 11 Exch 19 (when plaintiff who had an immediate right to possession enters he may sue for trespass committed prior to the entry); *Twyman v Knowles* (1853) 13 CB 222; *Rust v Victoria Graving Dock* (1887) 36 ChD 113 at 119, CA (trifling interest may give only nominal damages); *Cox v Glue* (1848) 5 CB 533; *Bedingfield v Onslow* (1685) 3 Lev 209; *Jefferson v Jefferson* (1683) 3 Lev 130; *Jesser v Gifford* (1767) 4 Burr 2141; *Young v Spencer* (1829) 10 B & C 145; *Evelyn v Raddish* (1817) Holt NP 543; *Baxter v Taylor* (1832) 4 B & Ad 72; *Johnstone v Hall* (1856) 2 K & J 414 (each person whose interest has been injured may sue but may only recover in respect of their own interest).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(2) CASES OTHER THAN PERSONAL INJURY/(ii) Injury to Land/871. Straying livestock and damage caused by dogs.

### 871. Straying livestock and damage caused by dogs.

Both the tort of cattle trespass and the self-help remedy of distress damage feasant in so far as it applied to animals have been abolished and replaced by statute<sup>1</sup>. Liability for damage done by straying livestock<sup>2</sup> to land or any property in the ownership or possession of the occupier and for any expenses reasonably incurred, either because the straying animals cannot be returned or because the animals are detained to ensure payment for damage done to the property of the plaintiff, is strict<sup>3</sup>.

If animals are pastured on the land of another but outstay the permission, they will be trespassing but may not be 'straying'<sup>4</sup>, though even a minor intrusion may constitute straying<sup>5</sup>. As in the case of cattle trespass, 'damage' would appear to include damage to other animals, both by contact<sup>6</sup> and infection<sup>7</sup>, and damage to crops and vehicles<sup>8</sup>. There is no liability under these provisions for straying cats and dogs<sup>9</sup>, though such entry might amount to nuisance or a common law trespass<sup>10</sup>, nor is there liability for personal injuries<sup>11</sup>. There is also no liability if the straying is due wholly to the fault of the plaintiff<sup>12</sup>. This includes not only contributory negligence<sup>13</sup> but also includes a case where the straying would not have occurred but for the breach by some person other than the defendant of a duty to fence. A mere failure to fence is not of itself fault<sup>14</sup>.

A person is not liable under these provisions where the livestock strayed from a highway and its presence there was a lawful use of the highway<sup>15</sup>. The defences of act of God, act of a third party and consent which once applied to cattle trespass, no longer apply to this statutory liability<sup>16</sup>, except so far as it can be treated as 'fault' of the plaintiff, being abrogated not only by the abolition of cattle trespass<sup>17</sup> but by the provision that the possessor of straying livestock is liable except as otherwise provided by the Animals Act 1971<sup>18</sup>.

Where a dog causes damage by killing or injuring livestock, any person who is a keeper of the dog is liable for the damage<sup>19</sup>, unless the livestock was killed or injured on land on to which it had strayed and either the dog belonged to the occupier or its presence on the land was authorised by the occupier<sup>20</sup>. It is also a defence that the damage was due wholly to the fault of the person suffering it<sup>21</sup>.

1 See the Animals Act 1971 ss 1(1)(c), 7(1); and ANIMALS vol 2 (2008) PARA 752 et seq.

2 For the meaning of 'livestock', which includes 'poultry', see *ibid* s 11; and ANIMALS vol 2 (2008) PARA 755.

3 See *ibid* s 4(1)(a), (b); and ANIMALS vol 2 (2008) PARA 755. Liability is imposed on 'the person to whom the livestock belongs' who, by s 4(2), is the person in whose possession it is. Only the side note, not the section, mentions trespass, so a technical trespass may not be necessary: see North *The Modern Law of Animals* (1st Edn, 1972), pp 95, 105-107. *Ellis v Loftus Iron Co* (1874) LR 10 CP 10 is no longer good law on this point. The Animals Act 1971 s 4 applies to 'damage' not 'loss', so that it may not apply to loss without damage, as where an infected animal merely strays but involves the land in disease restrictions: see North *The Modern Law of Animals* (1st Edn, 1972), pp 102-103. As to purely economic loss see *Weller & Co v Foot and Mouth Disease Research Institute* [1966] 1 QB 569, [1965] 3 All ER 560.

4 North *The Modern Law of Animals* (1st Edn, 1972), p 107.

5 *Wiseman v Booker* (1878) 3 CPD 184.

6 *Lee v Riley* (1865) 18 CBNS 722; *Ellis v Loftus Iron Co* (1874) LR 10 CP 10.

7 *Theyer v Purnell* [1918] 2 KB 333; *Earp v Faulkner* (1875) 34 LT 284 at 286, CA.

8 *Park v J Jobson & Son* [1945] 1 All ER 222, CA; *Sutcliffe v Holmes* [1947] KB 147, [1946] 2 All ER 599, CA; *Cooper v Railway Executive* [1953] 1 All ER 477, [1953] 1 WLR 223.

9 They are not within the definition of 'livestock' in the Animals Act 1971 s 11. Fleeting visits are not even trespass: *Buckle v Holmes* [1926] 2 KB 125, CA.

10 *League Against Cruel Sports Ltd v Scott* [1986] QB 240, [1985] 2 All ER 489.

11 This is despite the fact that the Animals Act 1971 s 11 defines 'damage' as including death or injury to any person. Section 4(1)(a) specifically mentions only damage to land or property.

12 See *ibid* s 5(1); and ANIMALS vol 2 (2008) PARAS 755, 922.

13 *Ibid* s 11 provides that 'fault' has the same meaning as in the Law Reform (Contributory Negligence) Act 1945: see s 4; and NEGLIGENCE vol 78 (2010) PARA 75.

14 See the Animals Act 1971 s 5(6); and ANIMALS vol 2 (2008) PARA 755.

15 See *ibid* s 5(5).

16 North *The Modern Law of Animals* (1st Edn, 1972), pp 114-115.

17 See the text and note 1 *supra*.

18 See the Animals Act 1971 s 4(1).

19 See *ibid* s 3.

20 See *ibid* s 5(4).

21 See *ibid* s 5(1). 'Fault' includes contributory negligence: see note 13 *supra*.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(2) CASES OTHER THAN PERSONAL INJURY/(ii) Injury to Land/872. Trespass to land; wrongful occupation.

## **872. Trespass to land; wrongful occupation.**

The plaintiff may sue for recovery of the land together with an action for mesne profits, or sue for mesne profits if he has returned into occupation<sup>1</sup> or his interest has determined<sup>2</sup>. Despite its name, an action for mesne profits is not confined to the profit made by the defendant from the wrongful occupation but covers all the plaintiff's loss<sup>3</sup>.

Damages are not necessarily limited to the diminution in value of the land but may be awarded at a higher figure to represent a fair charge for the use the defendant has made of the land<sup>4</sup>. The normal measure is the market rental value of the property for the period of wrongful occupation without any deduction for the fact that the property might not have been fully occupied or might have been used unprofitably had it remained in the occupation of the plaintiff during that period<sup>5</sup>. Such a claim now applies to restitution rather than damages<sup>6</sup>, but a claim for damages survives and may be appropriate in exceptional cases, as where property is subject to concessionary rents so that full market value would not give a proper measure of the plaintiff's loss or the defendant's gain<sup>7</sup>.

<sup>1</sup> *Harris v Mulkern* (1875) 1 Ex D 31. If the two actions are combined there is no need for re-entry by the plaintiff. See further TORT.

<sup>2</sup> *Southport Tramways v Gandy* [1897] 2 QB 66, CA.

<sup>3</sup> *Dunn v Large* (1783) 3 Doug KB 335; *Goodtitle v Toombs* (1770) 3 Wils 118 at 121 per Gould J.

<sup>4</sup> *Whitwham v Westminster Brymbo Coal Co* (1896) 2 Ch 538, CA (dumping colliery spoil); *Penarth Dock Engineering Co v Pounds* [1963] 1 Lloyd's Rep 359 (delay removing pontoon); *Swordheath Properties Ltd v Tabet* [1979] 1 All ER 240, [1979] 1 WLR 285, CA (tenants holding over); and see TORT.

<sup>5</sup> *Inverugie Investments v Hackett* [1995] 3 All ER 841, [1995] 1 WLR 713, PC.

<sup>6</sup> *Inverugie Investments v Hackett* [1995] 3 All ER 841 at 845 [1995] 1 WLR 713 at 718, PC (elements of both damages and restitution); *Ministry of Defence v Ashman* (1993) 25 HLR 513 at 519, CA, per Hoffmann LJ. See generally paras 1098-1099 post. As to restitution generally see RESTITUTION.

<sup>7</sup> *Ministry of Defence v Ashman* (1993) 25 HLR 513, CA; *Ministry of Defence v Thompson* (1993) 25 HLR 552, [1993] EGCS 81, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(2) CASES OTHER THAN PERSONAL INJURY/(ii) Injury to Land/873. Injury to land by nuisance.

### **873. Injury to land by nuisance.**

The purpose of damages in the case of injury to land by nuisance is to protect the amenity value of land<sup>1</sup>, and no action will lie unless the claimant has a proprietary or possessory interest (which may be a reversionary interest) in that land<sup>2</sup>. Damages for personal injuries are not recoverable and therefore comparison with personal injury awards are not normally appropriate<sup>3</sup>. If only physical damage to land is caused, the measure of damages is the diminution of the value of the land<sup>4</sup>. This may be the cost of repair or restoration but if that exceeds the diminution in the value of the land, the higher amount will be awarded if the plaintiff reasonably intends to repair and occupy the property, the lower if it is to be sold in its damaged state<sup>5</sup>.

If the plaintiff, in the exercise of reasonable commercial judgment postpones repairs until assured that damages will be recovered, and in that time the cost of repairs increases, the full cost may still be recovered<sup>6</sup>. If the damage or destruction reduces the cost of redevelopment, as by eliminating the need for demolition, this may be taken into account in the assessment of damages<sup>7</sup>.

Interference other than physical damage will also be compensated, such as noise<sup>8</sup>, smell<sup>9</sup>, interference with business<sup>10</sup>, interference with easements<sup>11</sup> and costs of removal<sup>12</sup>. If some part of the disturbance of enjoyment is reasonable and thus not tortious, the damages which would otherwise have been awarded will be appropriately reduced<sup>13</sup>. If the nuisance is continuing, a fresh cause of action will accrue from day to day for so long as the nuisance continues<sup>14</sup>. If damages are awarded in lieu of an injunction<sup>15</sup>, they may cover possible future, as well as past, damage<sup>16</sup>. Only foreseeable<sup>17</sup>, rather than all direct, damage is remediable, even if liability is strict<sup>18</sup>.

1 *Hunter v Canary Wharf Ltd* [1997] AC 655 at 692, [1997] 2 All ER 426 at 438, HL, per Lord Goff of Chieveley, at 696 and 442 per Lord Lloyd of Berwick, and at 704-706 and 451 per Lord Hoffmann. See NUISANCE vol 78 (2010) PARA 227.

2 *Hunter v Canary Wharf Ltd* [1997] AC 655 at 692, [1997] 2 All ER 426 at 438, HL, per Lord Goff of Chieveley, at 696 and 442 per Lord Lloyd of Berwick, and at 704-706 and 451 per Lord Hoffmann. See NUISANCE vol 78 (2010) PARA 227.

3 *Hunter v Canary Wharf Ltd* [1997] AC 655 at 692, [1997] 2 All ER 426 at 438, HL, per Lord Goff of Chieveley, at 696 and 442 per Lord Lloyd of Berwick, and at 704-706 and 451-453 per Lord Hoffmann.

4 *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433, CA; *Lodge Holes Colliery Co v Wednesbury Corp* [1908] AC 323, HL; *Snell & Prideaux v Dutton Mirrors* [1995] 1 EGLR 259, CA; *Moss v Christchurch RDC* [1925] 2 KB 750; *Bunclark v Hertfordshire County Council* [1977] 2 EGLR 114; *Blue Circle Industries plc v Ministry of Defence* [1996] EGCS 26 (Nuclear Installations Act 1965, but common law principles of assessment applied).

5 *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928 at 938, [1980] 1 WLR 433 at 456-457, CA, per Donaldson LJ, recognising that there may be intermediate cases.

6 *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928 at 934, [1980] 1 WLR 433 at 452-453, CA, per Megaw LJ; distinguishing *Liesbosch Dredger v SS Edison* [1933] AC 449, HL.

7 *Taylor (CR) (Wholesale) Ltd v Hepworths Ltd* [1977] 2 All ER 784, [1977] 1 WLR 659.

8 *Halsey v Esso Petroleum Co* [1961] 2 All ER 145, [1961] 1 WLR 683. See NUISANCE vol 78 (2010) PARA 125.

- 9 *Bone v Seale* [1975] 1 All ER 787, [1975] 1 WLR 797, CA (analogy drawn with loss of amenity in personal injuries); disapproved in *Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426, HL.
- 10 *Fritz v Hobson* (1880) 14 ChD 542. Loss of profit and custom must be proved: *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888, [1986] 1 WLR 922 (interference with light, damages only awarded for loss of amenity); *Stoke-on-Trent City Council v W & J Wass* [1988] 3 All ER 394, [1988] 1 WLR 1406, CA (infringement of right of market, nominal damages).
- 11 *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888, [1986] 1 WLR 922.
- 12 *Grosvenor Hotel Co v Hamilton* [1894] 2 QB 836 at 840, CA, per Lindley LJ.
- 13 *Andreae v Selfridge & Co Ltd* [1938] Ch 1, [1937] 3 All ER 255, CA. This qualification does not apply to physical damage: *Clift v Welsh Office* (1998) Times 24 August, CA. On consequential loss see *Hunter v Canary Wharf Ltd* [1997] AC 655 at 706-708, [1997] 2 All ER 426 at 451-452, HL, per Lord Hoffmann.
- 14 *Maberley v Henry W Peabody & Co of London Ltd, Rowland Smith Motors Ltd and Rowland Smith* [1946] 2 All ER 192; *Hole v Chard Union* [1894] 1 Ch 293, CA. Damages are assessed down to the time of assessment: RSC Ord 37 r 6. A person suing for continuing nuisance may also recover for damage done before he went into occupation: *Masters v Brent London Borough Council* [1978] QB 841, [1978] 2 All ER 664.
- 15 le by virtue of the Supreme Court Act 1981 s 50.
- 16 *Leeds Industrial Co-operative Society v Slack* [1924] AC 851, HL.
- 17 See *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2)* [1967] 1 AC 617, [1966] 2 All ER 709, PC.
- 18 *Cambridge Water Co v Eastern Counties Leather Co* [1994] 2 AC 264, [1994] 1 All ER 53, HL. But where property on a highway becomes dangerous through want of repair the occupier, or owner if under a duty to repair, will be liable whether he knew or ought to have known of the danger, but not if the danger was caused by a trespasser or an unobservable process of nature: *Wringe v Cohen* [1940] 1 KB 229, [1939] 4 All ER 241, CA; *Cushing v Peter Walker & Son (Warrington and Burton) Ltd* [1941] 2 All ER 693; *Mint v Good* [1951] 1 KB 517, [1950] 2 All ER 1159, CA.

## UPDATE

### 873 Injury to land by nuisance

NOTE 2--See *Dobson v Thames Water Utilities Ltd* [2009] EWCA Civ 28, [2009] 3 All ER 319.

NOTE 14--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

NOTE 15--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 16--See also *Alcoa Minerals of Jamaica Inc v Broderick* [2000] 3 WLR 23, PC.

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### (iii) Miscellaneous

#### 874. Duty arising under contract and tort.

It is now settled that there may be concurrent duties in tort and contract. A claimant may rely on the remedy which is the more advantageous to him unless the duty in tort is so inconsistent with the contract that the parties must be taken to have agreed that the remedy in tort is to be limited or excluded<sup>1</sup>. This choice may be of significance not only in relation to damages but also to limitation<sup>2</sup> and contributory negligence<sup>3</sup>.

1 *Henderson v Merrett Syndicates Ltd*[1995] 2 AC 145 at 193, [1994] 3 All ER 506 at 532, HL, per Lord Goff of Chieveley; approving *Midland Bank Trust Co v Hett Stubbs & Kemp*[1979] Ch 384, [1978] 3 All ER 571; and disapproving contrary dicta in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*[1986] AC 80 at 107, [1985] 2 All ER 947 at 957, PC. Recent cases affirming concurrent liability include: *Forsikringsaktieselskapet Vesta v Butcher*[1989] AC 852 at 860, [1988] 2 All ER 43 at 47, CA, per O'Connor LJ (affd on other grounds [1989] AC 852, [1989] 1 All ER 402, HL); *Bell v Peter Browne & Co*[1990] 2 QB 495, [1990] 3 All ER 124, CA; *Punjab National Bank v De Boinville*[1992] 3 All ER 104, [1992] 1 WLR 1138, CA; *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep 127, CA; *Lancashire and Cheshire Association of Baptist Churches Inc v Howard and Seddon Partnership (a firm)*[1993] 3 All ER 467, 65 BLR 21. Various cases express approval of the view disapproved in *Henderson v Merrett Syndicates Ltd* supra: *National Bank of Greece SA v Pinios Shipping Co*[1990] 1 AC 637, [1990] 1 All ER 78, HL; *Reid v Rush & Tompkins Group plc*[1989] 3 All ER 228, [1990] 1 WLR 212, CA; *Lee v Thompson*[1989] 2 EGLR 151, CA; *Johnstone v Bloomsbury Health Authority*[1992] QB 333, [1991] 2 All ER 293, CA; *Downsview Nominees Ltd v First City Corpn*[1993] AC 295, [1993] 3 All ER 626, PC; *Holt v Payne Skillington* (1995) 77 BLR 51, [1995] ECGS 201, CA.

2 See LIMITATION PERIODS vol 68 (2008) PARA 952 et seq.

3 See NEGLIGENCE vol 78 (2010) PARA 75 et seq.

### UPDATE

#### 874 Duty arising under contract and tort

NOTE 1--*Forsikringsaktieselskapet Vesta v Butcher*, cited, applied in *UCB Bank plc v Hephherd Winstanley & Pugh (A Firm)* (1999) Times, 25 August, CA (solicitor's liability for breach of duty of care arose both in contract and tort).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(2) CASES OTHER THAN PERSONAL INJURY/(iii) Miscellaneous/875. Torts of statement and misstatement.

### **875. Torts of statement and misstatement.**

In the torts of libel and slander the plaintiff is entitled to general damages for injury to his reputation, and for pecuniary loss flowing from the defamation<sup>1</sup>. The Court of Appeal may substitute its own award for an excessive or inadequate jury award<sup>2</sup>.

In deceit the defendant is liable for the direct consequences of the tort whether or not they were foreseeable<sup>3</sup>. If the deceit results in a contract the normal measure is the difference between the price paid and the value of the subject matter transferred on the date of acquisition<sup>4</sup>. If the subject matter is worthless then the full price may be recovered<sup>5</sup>. The normal measure may be displaced if the misrepresentation is continuing and the subject matter suffers from a pre-existing defect, not necessarily related to the misrepresentation, which reduces its value. Resale price may then be used<sup>6</sup>. Though later matters may be admitted as evidence of value<sup>7</sup>, no account will be taken of the fact that the plaintiff might have sold the subject matter at a price above its real value before the fraud was revealed<sup>8</sup>. When there is no contract, all direct loss may be recovered, including loss of profits<sup>9</sup>, value of property lost<sup>10</sup> and expenses<sup>11</sup>. Consequential losses are recoverable<sup>12</sup> as are damages for physical injury, anxiety and stress<sup>13</sup>.

Damages are to place the plaintiff in the same position as if the misrepresentation had not been made<sup>14</sup>. This applies to liability both at common law<sup>15</sup> and under the Misrepresentation Act 1967 for negligent misrepresentation<sup>16</sup>, but damages under the Act in substitution for rescission for innocent misrepresentation attract the contractual measure, placing the plaintiff in the same position as if the misrepresentation had been true<sup>17</sup>. Damages may be recoverable in respect of the expenses of investigation and detection<sup>18</sup>.

1 *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86, [1964] 3 All ER 947, CA. See LIBEL AND SLANDER vol 28 (Reissue) PARA 248 et seq.

2 See the Courts and Legal Services Act 1990 s 8(2). See also *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, [1993] 4 All ER 975, CA; *John v MGN Ltd* [1997] QB 586, [1996] 2 All ER 35, CA. The statutory provision also complies with the right to the freedom of expression under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969; ETS no 5) art 10: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 158-159.

3 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, [1969] 2 All ER 119, CA; *Smith, Kline & French Laboratories Ltd v Long* [1988] 3 All ER 887, [1989] 1 WLR 1, CA; *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, [1996] 4 All ER 769, HL; *Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426, CA; *Alliance and Leicester Building Society v Edgestop Ltd* [1994] 2 All ER 38, [1993] 1 WLR 1462 (contributory negligence does not apply to fraud but does apply to liability for negligent misrepresentation under the Misrepresentation Act 1967 s 2(1)); and see *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, [1992] 1 All ER 865.

4 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, [1996] 4 All ER 769, HL. Though most of the authorities relate to shares, the principles apply to other subject matter: see *Twycross v Grant* (1877) 2 CPD 469 at 544-545, CA, per Cockburn CJ; *Clark v Urquhart* [1930] AC 28 at 68, HL, per Lord Atkin; and *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* supra at 278-279 and 789 per Lord Steyn.

5 *Twycross v Grant* (1877) 2 CPD 469, CA.

6 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 [1996] 4 All ER 769, HL.

7 *Peek v Derry* (1887) 37 ChD 541 at 592-593, CA, per Cotton LJ.



- 8 *Twycross v Grant* (1877) 2 CPD 469 at 490, CA.
- 9 *Barley v Walford* (1846) 9 QB 197; *East v Maurer* [1991] 2 All ER 733, [1991] 1 WLR 461, CA.
- 10 *Mafo v Adams* [1970] 1 QB 548, [1969] 3 All ER 1404, CA; *Smith Kline & French Laboratories Ltd v Long* [1988] 3 All ER 887, [1989] 1 WLR 1, CA (market value, not lower cost of replacement).
- 11 *Richardson v Silvester* (1873) LR 9 QB 34; *Wilkinson v Downton* [1897] 2 QB 57.
- 12 *Mullett v Mason* (1866) LR 1 CP 559; *Clarke v Yorke* (1882) 47 LT 381; *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, [1969] 2 All ER 119, CA; *Archer v Brown* [1985] QB 401, [1984] 2 All ER 267; *Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426, CA.
- 13 *Wilkinson v Downton* [1897] 2 QB 57; *Burrows v Rhodes* [1899] 1 QB 816.
- 14 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 at 170, [1969] 2 All ER 119 at 123, CA. *Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426, CA; *Shelley v Paddock* [1980] 1 QB 348; [1980] 1 All ER 1009, CA; *Archer v Brown* [1985] QB 401, [1984] 2 All ER 267; *McConnel v Wright* [1903] 1 Ch 546, CA; *Twycross v Grant* (1877) 2 CPD 469, CA.
- 15 See *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA.
- 16 See the Misrepresentation Act 1967 s 2(1); MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 811. See also *Royscott Trust Ltd v Rogerson* [1991] 2 QB 297, [1991] 3 All ER 294, CA; *Cemp Properties (UK) Ltd v Dentsply Research and Development Corp* [1991] 2 EGLR 197, CA; *Chesneau v Interhome Ltd* (1983) 134 NLJ 341, CA; *Downs v Chappell* [1996] 3 All ER 344, [1997] 1 WLR 426, CA; *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573.
- 17 *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932 at 962, [1994] 1 WLR 1016 at 1045, CA, per Evans LJ discussing the Misrepresentation Act 1967 s 2(2). The statutory power to award damages in lieu of rescission may be exercised even though the right to rescission ceased to exist before the proceedings: *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573. As to the exercise of discretion see also *R v Wheeler* (1990) 92 Cr App Rep 279 at 283, CA, per Stuart-Smith LJ.
- 18 *British Motor Trade Association v Salvadori* [1949] Ch 556, [1949] 1 All ER 208.

## UPDATE

### 875 Torts of statement and misstatement

NOTE 2--See *Kiam v MGN Ltd* [2002] EWCA Civ 43, [2003] QB 281 (award outside bracket proposed by judge but not excessive enough to justify interference by Court of Appeal).

NOTE 9--There is no absolute rule requiring a deceived person to prove that the actual transaction which he had been induced to enter into was itself loss-making: *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd (sued as Sovereign Chemicals Industries Ltd)* [2001] QB 488, [2000] 3 All ER 493, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(2) CASES OTHER THAN PERSONAL INJURY/(iii) Miscellaneous/876. Reduction of damages on account of contributory negligence.

### **876. Reduction of damages on account of contributory negligence.**

The contributory negligence of the plaintiff is no bar to his claim<sup>1</sup>, but will reduce the damages<sup>2</sup> to which he is entitled<sup>3</sup>. Where any person suffers damage<sup>4</sup> as the result partly of his own fault<sup>5</sup> and partly of the fault of any other person or persons, a claim in respect of that damage is not defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect of it will be reduced to such extent as the court<sup>6</sup> thinks just and equitable having regard to the claimant's share in the responsibility for the damage<sup>7</sup>. The court must have regard both to causation and to the relative blameworthiness of the parties<sup>8</sup>. An apportionment made by the trial judge will only be altered on appeal when it is clearly wrong or there has been an error in principle or a mistake of fact<sup>9</sup>.

Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and by virtue of the above provisions the damages recoverable in an action brought for the benefit of his estate would be reduced<sup>10</sup>, any damages recoverable in an action are reduced to a proportionate extent<sup>11</sup>. The statutory provisions<sup>12</sup> permit reduction of damages where there is contributory negligence by the person suffering damage. A passenger on a ship or vehicle or a person under the direction of another will not be identified with the contributory negligence of those in charge<sup>13</sup>.

There may be sub-apportionment when there are two successive torts, the first contributing to cause the second<sup>14</sup>. When there are multiple defendants the contributory negligence of the plaintiff should be determined in comparison with the totality of the conduct of the defendants and their individual responsibilities settled in separate contribution proceedings between them<sup>15</sup>. It has been held that there can<sup>16</sup> and also that there cannot be 100 per cent contributory negligence<sup>17</sup>. The apportionment may be expressed by the court determining the percentage by which the plaintiff contributed to the harm which he suffered and then reducing what would otherwise have been the total of the damages by that percentage. That percentage and the balance for which the defendant is responsible must amount to 100 per cent<sup>18</sup>. The court should not normally apportion for minor contributory negligence but there is no firm rule<sup>19</sup>. If, as in some highway accidents, both parties appear to be to blame but it is not possible to determine degrees of fault, they will be held equally liable<sup>20</sup>.

1 See generally NEGLIGENCE vol 78 (2010) PARA 75 et seq.

2 The defence of contributory negligence does not apply to conversion or intentional trespass to goods: see the Torts (Interference with Goods) Act 1977 s 11(1). For an exception to this rule see the Banking Act 1979 s 47 (saved by the Banking Act 1987 s 108(2), Sch 7 Pt I); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 884. In *Alliance and Leicester Building Society v Edgestop Ltd* [1994] 2 All ER 38, [1993] 1 WLR 1462 the defence of contributory negligence was held not to apply to the tort of deceit, and in *Corporacion Nacional del Cobre de Chile v Sogemin Metals Ltd* [1997] 2 All ER 917, [1997] 1 WLR 1396 it was held not to apply to a conspiracy claim based on bribery. These authorities take the view that the definition of 'fault' in the Law Reform (Contributory Negligence) Act 1945 excludes the application of that Act to torts to which the defence did not apply prior to 1945. This has produced a conflict of authorities as to whether the 1945 Act applies to assault and battery: see *Murphy v Culhane* [1977] QB 94, [1976] 3 All ER 533, CA; *Hoebergen v Koppens* [1974] 2 NZLR 597; *Barnes v Nayer* (1986) Times, 19 December, CA; and *Wasson v Chief Constable Royal Ulster Constabulary* [1987] 8 NIJB 34 suggesting it does apply; and cf Childs 'Pause for Thought; Contributory Negligence and Intentional Trespass To The Person' (1993) 44 NILQ 334; *Lane v Holloway* [1968] 1 QB 379, [1967] 3 All ER 129, CA; and *Horkin v North Melbourne Football Club Supporters Club* [1983] 1 VR 153 (relied on in *Corporacion Nacional del Cobre de Chile v Sogemin Metals Ltd* supra) suggesting that it does not. It seems that the cognate defence of provocation will merely exclude exemplary and aggravated damages: *Lane v Holloway* supra; *Fontin v Katapodis* (1962) 108 CLR 177; but see *Murphy v Culhane* supra; cf *Revill v Newbery*

[1996] QB 567, [1996] 1 All ER 291, CA (negligent shooting; Law Reform (Contributory Negligence) Act 1945 applied). Causation may also reduce damages: *Gray v Barr* [1971] 2 QB 554, [1971] 2 All ER 949, CA.

The Law Reform (Contributory Negligence) Act 1945 does apply to a claim under the Misrepresentation Act 1967 s 2(1): see *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, [1992] 1 All ER 865 (the defendant was also liable for the tort of negligence); and NEGLIGENCE vol 78 (2010) PARA 75. The Law Reform (Contributory Negligence) Act 1945 also applies to the tort of nuisance: see *Trevett v Lee* [1955] 1 All ER 406, [1955] 1 WLR 113, CA; and NUISANCE vol 78 (2010) PARA 194.

3 To similar effect see the Merchant Shipping Act 1995 s 189(1), (3), (4); and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1062.

4 'Damage' includes loss of life and personal injury: see the Law Reform (Contributory Negligence) Act 1945 s 1(6). A person may be guilty of contributory negligence even though his conduct in no way contributed to the accident itself if his act or omission contributed to the nature or extent of his injuries: see *O'Connell v Jackson* [1972] 1 QB 270, [1971] 3 All ER 129, CA (failure of motor cyclist to wear crash helmet). As regards failure to wear a seat belt in a motor car see *Froom v Butcher* [1976] QB 286, [1975] 3 All ER 520, CA, prescribing a 25% reduction if wearing the belt would have prevented all injury and 15% if the injury would have been less severe with no reduction if the injury would have occurred in any event. See also *Capps v Miller* [1989] 2 All ER 333, [1989] 1 WLR 839, CA (10% reduction for not fastening strap of motor cyclist's helmet); *Gregory v Kelly* [1978] RTR 426 (40% reduction when plaintiff also knew that the brake was defective). In *Condon v Condon* [1978] RTR 483 a phobia, and in *Mackay v Borthwick* 1982 SLT 265 a hiatus hernia, excused wearing a belt. See also *Owens v Brimmell* [1977] QB 859, [1976] 3 All ER 765; *Patience v Andrews* [1983] RTR 447; *Roberts v Sparks* [1977] CLY 2643; *Traynor v Donovan* [1978] CLY 2612; *Lertora v Finzi* [1973] RTR 161 (possibility of other injuries and causation).

5 'Fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from the Law Reform (Contributory Negligence) Act 1945, give rise to the defence of contributory negligence: s 4. Certain statutes provide that damage for which a person is liable thereunder is, for the purpose of the Law Reform (Contributory Negligence) Act 1945, to be treated as due to his fault: see eg the Animals Act 1971 s 10 (amended by the Limitation Act 1980 s 40(2), Sch 3 para 10); and see ANIMALS vol 2 (2008) PARA 755.

6 'Court' means, in relation to any claim, the court or arbitrator by or before whom the claim falls to be determined: Law Reform (Contributory Negligence) Act 1945 s 4. Where the case is tried with a jury, the jury must determine the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced: see s 1(6).

7 Ibid s 1(1). The court must nevertheless find and record the total damages which would have been recoverable if the claimant had not been at fault: s 1(2). In county court cases the court's jurisdiction is governed by the total damages which would have been recoverable: *Kelly v Stockport Corp'n* [1949] 1 All ER 893, CA; doubted and not followed in *Artt v WG and T Greer* [1954] NI 112.

The Law Reform (Contributory Negligence) Act 1945 s 1(1) leaves unaffected any defence arising under a contract and limitations of liability by contract or statute, but it applies in cases where the defendants are joint or several tortfeasors liable to contribute inter se under the Civil Liability (Contribution) Act 1978: see PARA 845 ante. If one person at fault avoids liability to any other person at fault or his personal representative by pleading the Limitation Act 1980, or any other enactment limiting the time within which proceedings may be taken, he cannot recover any damages or contribution from that other person or representative by virtue of the Law Reform (Contributory Negligence) Act 1945 s 1: s 1(5). Maritime claims are not affected by the Law Reform (Contributory Negligence) Act 1945: see s 3(1); and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1060-1062.

See also *Boothman v British Northrop Ltd* (1972) 13 KIR 112, CA, in which it was held to be incorrect to suggest that the court may disregard contributory negligence in awarding damages, if it thinks it just and equitable. Where a defendant is in breach of statutory duty the court will not judge the plaintiff's lack of care too harshly, as this would defeat the object of the legislation: *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 176-178, [1939] 3 All ER 722 at 738-739, HL, per Lord Wright; *Mullard v Ben Line Steamers Ltd* [1971] 2 All ER 424, [1970] 1 WLR 1414, CA; but see *Staveley Iron and Chemical Co Ltd v Jones* [1956] AC 627 at 648, [1956] 1 All ER 403 at 413, HL, per Lord Tucker; approving *Caswell v Powell Duffryn Associated Collieries Ltd* supra for breach of statutory duty, but indicating that it did not extend to cases of common law negligence 'where there is no evidence of workpeople performing repetitive work under strain or for long hours at dangerous machines': see *Staveley Iron and Chemical Co Ltd v Jones* supra at 647 and 413 per Lord Tucker.

8 *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291, [1949] 1 All ER 620, CA; *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682, [1953] 2 All ER 478 at 486, HL, per Lord Reid; *The Miraflores and The Abadesa* [1967] 1 AC 826 at 845, [1967] 1 All ER 672 at 677, HL, per Lord Pearce; *Keaney v British Railways Board* [1968] 2 All ER 532 at 544, [1968] 1 WLR 879 at 893, CA, per Winn LJ; *Brown v Thompson* [1968] 2 All ER 708 at 709, [1968] 1 WLR 1003 at 1008, CA, per Winn LJ; *Baker v Willoughby* [1970] AC 467 at 490, [1969] 3 All ER 1528 at 1530, HL, per Lord Reid. 'Blameworthiness' indicates not moral fault but departure from the standard of the

reasonable person: *Westwood v Post Office* [1974] AC 1 at 16, [1973] 3 All ER 184 at 192, HL, per Lord Kilbrandon; *Jones v Livox Quarries Ltd* [1952] 2 QB 608 at 615, [1952] 1 TLR 1377 at 1383, CA, per Denning LJ.

9 *Kerry v Carter* [1969] 3 All ER 723, [1969] 1 WLR 1372, CA; *Brown v Thompson* [1968] 2 All ER 708, [1968] 1 WLR 1003, CA; *Quintas v National Smelting Co Ltd* [1961] 1 All ER 630 at 636, [1961] 1 WLR 401 at 409, CA, per Sellers LJ; *Chisman v Electromotion* (1969) 6 KIR 456, (1969) 113 Sol Jo 246, CA; *Jennings v Norman Collison (Contractors) Ltd* [1970] 1 All ER 1121 at 1126-1128, CA, per Salmon LJ and Winn LJ; *Hannam v Mann* [1984] RTR 252, CA. Where a reduction of damages has been made by a jury, an application for a new trial will be governed by similar principles to those which govern an application for a new trial on a question of assessment of damages: cf para 1162 post.

10 Ie because, by the Law Reform (Miscellaneous Provisions) Act 1934 s 1 (as amended), it is the cause of action of the deceased person which survives, and this is subject to the Law Reform (Contributory Negligence) Act 1945 s 1(1). See further EXECUTORS AND ADMINISTRATORS.

11 See the Fatal Accidents Act 1976 s 5 (as amended); and NEGLIGENCE vol 78 (2010) PARA 75.

12 Ie the Law Reform (Contributory Negligence) Act 1945 s 1 (as amended): see further NEGLIGENCE vol 78 (2010) PARA 75.

13 *Mills v Armstrong, The Bernina* (1888) 13 App Cas 1, HL; *Oliver v Birmingham and Midland Motor Omnibus Co Ltd* [1933] 1 KB 35, DC. Nor is a bailor identified with the contributory negligence of the bailee: *Berrill v Road Haulage Executive* [1952] 2 Lloyd's Rep 490; *France v Parkinson* [1954] 1 All ER 739, [1954] 1 WLR 581, CA; *Wellwood v King (Alexander) Ltd* [1921] 2 IR 274. But the contributory negligence of an employee or agent may be attributed to an employer or principal: *Marginson v Blackburn Borough Council* [1939] 1 All ER 273, CA; *Berrill v Road Haulage Executive* supra; *Lampert v Eastern National Omnibus Co* [1954] 2 All ER 719n, [1954] 1 WLR 1047; *Carberry v Davies* [1968] 2 All ER 817, [1968] 1 WLR 1103, CA. The Fatal Accidents Act 1976 s 5 (as amended) identifies a dependant with the contributory negligence of the deceased and the Congenital Disabilities (Civil Liability) Act 1976 s 1(1), (2) identifies a child born disabled with the contributory negligence of the parents. See also *Dymond v Pearce* [1972] 1 QB 496, [1972] 1 All ER 1142, CA.

14 *The Calliope, The Carlsholm (Owners) v The Calliope (Owners)* [1970] P 172, [1970] 1 All ER 624.

15 *Fitzgerald v Lane* [1989] AC 328, [1988] 2 All ER 961, HL.

16 *Jayes v IMI (Kynoch) Ltd* [1985] ICR 155, 81 LS Gaz 3180, CA.

17 *Pitts v Hunt* [1991] 1 QB 24 at 48, [1990] 3 All ER 344 at 357, CA, per Beldam LJ. In such a case there would be no shared fault as required by the Law Reform (Contributory Negligence) Act 1945 s 1 (as amended). Such cases could be decided on causation: see *McKew v Holland and Hannen and Cubitts (Scotland) Ltd* 1970 SC 20, [1969] 3 All ER 1621, HL.

18 *Black v McCabe* [1964] NI 1, CA.

19 *Capps v Miller* [1989] 2 All ER 333 at 340, [1989] 1 WLR 839 at 849, CA, per Croom-Johnson LJ; explaining *Johnson v Tennant Bros* (19 November 1954, unreported), CA Transcript 329.

20 *Bray v Palmer* [1953] 2 All ER 1449, [1953] 1 WLR 1455, CA; *Baker v Market Harborough Industrial Co-operative Society* [1953] 1 WLR 1472, 97 Sol Jo 861, CA; *France v Parkinson* [1954] 1 All ER 739, [1954] 1 WLR 581, CA; *W & M Wood (Haulage) Ltd v Redpath* [1967] 2 QB 520, [1966] 3 All ER 556; *Davison v Leggett* (1969) 133 JP 440, (1969) Times, 8 May, CA (even though neither may have been to blame); *Howard v Bemrose* [1973] RTR 32, CA; *Knight v Fellick* [1977] RTR 316, CA (a party may be exculpated even though it cannot be shown how the accident occurred).

## UPDATE

### 876 Reduction of damages on account of contributory negligence

NOTE 2--Contributory negligence cannot be argued where the claimant establishes deceit: *Standard Chartered Bank v Pakistan National Shipping Corpn (No 4)* [2001] QB 167, [2000] 3 WLR 1692, CA; *Nationwide Building Society v Thimbleby & Co* [1999] EG 34 (CS).

NOTE 4--As to apportionment of liability for failure properly to secure a child in a motor car, see *Jones v Wilkins* [2001] RTR 283, CA.

NOTE 7--See *Sahib Foods Ltd (in liquidation) v Paskin Kyriakides Sands (a firm)* [2003] EWCA Civ 1832, (2004) Times, 23 January (damage to a factory caused by a fire which was the claimant's fault, but defendant architect also liable for not installing fire resistant panels).

NOTE 9--See *Brannan v Airtours plc* (1999) Times, 1 February, CA.

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**877. Costs.**

Where in any action the damages assessed have been apportioned as between defendants, or reduced by reason of the plaintiff's contributory negligence, the costs of the action remain entirely within the court's discretion<sup>1</sup>.

<sup>1</sup> See further PARA 847 ante.

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### **(3) PERSONAL INJURY**

#### **(i) Introduction**

##### **878. Personal injury claims; venue for proceedings.**

Proceedings in which county courts have jurisdiction and which include a claim for damages in respect of personal injuries<sup>1</sup> must be commenced in a county court, unless the value of the action is £50,000 or more<sup>2</sup>. A writ including a claim for personal injuries must be indorsed with a statement that the value of the claim exceeds £50,000<sup>3</sup>. In determining the value of the claim, no account is to be taken of a possible finding of contributory negligence<sup>4</sup>, except to the extent, if any, that such negligence is admitted<sup>5</sup>. Where the plaintiff seeks an award of provisional damages<sup>6</sup> no account must be taken of the possibility of a future application for further damages<sup>7</sup>.

The value of an action is determined as at the time when the action is commenced<sup>8</sup> and is taken to include sums which are required<sup>9</sup> to be paid to the Secretary of State under the relevant social security legislation<sup>10</sup>.

In determining the value of an action which is brought by more than one plaintiff or applicant, regard is to be had to the aggregate of the expectation or interests of all the plaintiffs or claimants<sup>11</sup>.

The commencement of proceedings in the High Court which should have been commenced in the county court may result in the action being transferred to the county court<sup>12</sup> or, where the court is satisfied that the person bringing the proceedings knew or ought to have known of the requirement, the action may be struck out<sup>13</sup>; and the county court has similar powers in relation to proceedings which should have been commenced in the High Court<sup>14</sup>. An action valued at more than £50,000 may be transferred to the county court or an action valued at less than that amount transferred to the High Court<sup>15</sup> and proceedings commenced in a county court or transferred to a county court may, if at any stage in them the High Court thinks it desirable that the proceedings, or any part of them, should be heard and determined in the High Court, be transferred by order to the High Court<sup>16</sup>. The High Court and the county courts, when considering whether to exercise their powers under these provisions, must have regard to the following criteria:

- 4 (1) the financial substance of the action, including the value of any counterclaim;
- 5 (2) whether the action is otherwise important and, in particular, whether it raises questions of importance to persons who are not parties or questions of general public interest;
- 6 (3) the complexity of the facts, legal issues, remedies or procedures involved;
- and
- 7 (4) whether transfer is likely to result in a more speedy trial of the action,

but no transfer may be made on the grounds of head (4) above alone<sup>17</sup>.

Where the sum claimed in a personal injuries action does not exceed £1,000, the claim should be referred to arbitration<sup>18</sup>. In computing the £1,000, items of special damage may be included in so far as they specifically arise out of and are referable to the injury<sup>19</sup>.

1 For these purposes, 'personal injuries' means personal injuries to the plaintiff or any other person, and includes disease, impairment of physical or mental condition, and death: High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 5(2).

2 Ibid art 5(1). The value of an action for a sum of money, whether specified or not, is the amount which the plaintiff reasonably expects to recover: art 9(1)(a).

3 *Practice Direction (Personal Injuries Action: Indorsement on Writ)*[1991] 3 All ER 352, [1991] 1 WLR 642, set out in the Supreme Court Practice 1997 para 971/2.

4 As to contributory negligence see PARA 876 et seq ante.

5 High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 9(4)(b).

6 le as described in the Supreme Court Act 1981 s 32A(2)(a) (as added): see PARA 930 post.

7 High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 9(4)(c).

8 Ibid art 10(a). In determining the value of an action, claims for unspecified further or other relief, interest and costs must be disregarded: see art 9(2).

9 le by virtue of the Social Security (Recovery of Benefits) Act 1997: see PARA 903 et seq post.

10 High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 9(4)(d).

11 Ibid art 9(3).

12 See the County Courts Act 1984 s 40(1)(a) (s 40 substituted by the Courts and Legal Services Act 1990 s 2(1)); *Practice Direction (Transfer of Proceedings between High Court and County Court)*[1991] 3 All ER 349, [1991] 1 WLR 643, set out in the Supreme Court Practice 1997 para 973/2.

13 See the County Courts Act 1984 s 40(1)(b) (as substituted: see note 12 supra). The power to strike out is likely to be exercised only in the absence of a bona fide mistake and where the plaintiff has been guilty of contumelious conduct or trying to gain some improper advantage: *Restick v Crickmore*[1994] 2 All ER 112, [1994] 1 WLR 420, CA.

14 See the County Courts Act 1984 s 42(1) (substituted by the Courts and Legal Services Act 1990 s 2(3)).

15 See the County Courts Act 1984 ss 40(2), 42(2) (as substituted): see notes 12, 14 supra.

16 See ibid s 41(1).

17 High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 7(5).

18 See CCR Ord 19 r 3(1A) which applies to proceedings issued on or after 8 January 1996. Where there is more than one claim in the same proceedings, it is necessary to show that at least one of the claims has a value of more than £1,000: *Holland v Ski Llandudno Ltd* (16 January 1998, unreported).

19 *Couldry v Hull Daily Mail Publications Ltd* (15 December 1997, unreported).

## UPDATE

### 878-881 Introduction

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 878 Personal injury claims; venue for proceedings

TEXT AND NOTES--References to 'plaintiff' are now to 'claimant': SI 1991/724 (amended by SI 1999/1014).



TEXT AND NOTES 1, 2--Replaced. Proceedings which include a claim for damages in respect of personal injuries may only be commenced in the High Court if the value of the claim is £50,000 or more: SI 1991/724 art 5(1) (amended by SI 1999/1014, SI 2009/577). SI 1991/724 art 5 does not apply to proceedings which include a claim for damages in respect of an alleged breach of duty of care committed in the course of the provision of clinical or medical services (including dental or nursing services): art 5(3) (amended by SI 1999/1014).

NOTE 2--SI 1991/743 art 9 substituted: see TEXT AND NOTES 4-11.

TEXT AND NOTES 4-11--Replaced. For the purposes of SI 1991/724 arts 4A, 5, the value of the claim is to be calculated in accordance with CPR 16.3(6) (see CIVIL PROCEDURE vol 11 (2009) PARA 586): SI 1991/724 art 9 (substituted by SI 1999/1014 and amended by SI 2009/577).

NOTE 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

TEXT AND NOTE 17--Revoked: SI 1999/1014. The value of a claim is now calculated in accordance with the CPR.

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### 879. General principles.

A person injured by another's wrong is entitled to general damages for non-pecuniary loss, such as his pain and suffering and loss of amenity, and to damages for pecuniary loss, both past and future, including loss of earnings, medical expenses, cost of nursing care and for loss of earning capacity where he is handicapped in the labour market. In the case of pecuniary losses, a statement of special damages must be served with the statement or particulars of claim<sup>1</sup>. Particulars of special damage, in the form of a schedule where appropriate, must be served in order that the extent to which special damages are agreed may be indicated in advance of the trial<sup>2</sup>. The different types of loss must be itemised in order that interest may be awarded on the special damage<sup>3</sup>, and also so that the plaintiff and defendant may know the sum assessed for each relevant head of damage in order to be able, on appeal, to challenge any error in the assessments<sup>4</sup>. The fact that itemisation may result in a very large global award does not of itself constitute good reason for reducing the overall amount<sup>5</sup>.

Damages awarded in the tort of negligence, whether for pecuniary or non-pecuniary loss, are compensatory and may be reduced by reason of payments received by the plaintiff as a result of his injury<sup>6</sup>. However, they are not to be reduced by reason of a pension to which the plaintiff has contributed<sup>7</sup> or by reason of gifts which may be made to relieve his distress<sup>8</sup>. Since an award of damages in a personal injuries action brought in negligence is compensatory, it is not to be the subject of an award of exemplary or punitive damages<sup>9</sup> or aggravated damages<sup>10</sup>; such damages may be available in an action for trespass to the person<sup>11</sup>.

1 See RSC Ord 18 r 12(1A). A 'statement of special damages claimed' means a statement giving full particulars of the special damages claimed for expenses and losses already incurred and an estimate of any future expenses and losses (including loss of earnings and of pension rights): see Ord 18 r 12(1C). In the county court, CCR Ord 6 r 1(5)(b) requires a statement of special damages to be served with the particulars of claim.

2 See *Practice Note (QBD) (Personal Injury Actions: Special Damage)* (1984) 1 August.

3 *Jefford v Gee* [1970] 2 QB 130, [1970] 1 All ER 1202, CA; *Cookson v Knowles* [1979] AC 556, [1978] 2 All ER 604, HL.

4 *George v Pinnock* [1973] 1 All ER 926, [1973] 1 WLR 118, CA.

5 *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, [1979] 2 All ER 910, HL; *Wells v Wells*, *Thomas v Brighton Health Authority*, *Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1998] 3 WLR 329, HL. However, the courts will be aware of the possibility of 'overlap' and some adjustment to the total may need to be made on that basis: *Dureau v Evans* [1996] PIQR Q18 at Q21, 146 NLJ Rep 1280, CA, where Kennedy LJ advocated the adoption of an 'overall view' in cases where there is a multiplicity of injuries. See also *Clarke v South Yorks Transport Ltd* (19 March 1998, unreported), CA.

6 See PARA 903 post.

7 *Parry v Cleaver* [1970] AC 1, [1969] 1 All ER 555, HL; *Longden v British Coal* [1998] PIQR Q11, HL.

8 *Redpath v Belfast and County Down Rly* [1947] NI 167.

9 'Anger and indignation is not a proper subject for compensation - it is neither pain nor suffering': *AB v South West Water Services Ltd* [1993] QB 507 at 528, [1993] 1 All ER 609 at 624, CA, per Stuart-Smith LJ (a claim for aggravated damages based on feelings of indignation at the defendant's high-handed conduct following a negligently committed public nuisance was struck out).

10 *Kralj v McGrath* [1986] 1 All ER 54 at 61 per Woolf J. However, the court must assess the impact of the defendant's conduct on the particular plaintiff, and the distress suffered by the plaintiff may be relevant to the assessment of damages.

11 *W v Meah* [1986] 1 All ER 935 (rape causing psychiatric disturbance to the victims; moderate aggravated damages awarded: £6,750 to one victim and £10,250 to the other, including the aggravated damages). In *Appleton v Garrett* [1996] PIQR P1 (unnecessary dental treatment on a large scale), it was held that there should be a relationship between the amount of general damages for pain and suffering and loss of amenity, and the amount of aggravated damages, therefore the greater the pain, suffering and loss, the greater the likely injury to the plaintiff's feelings as a result of the trespass; aggravated damages were assessed at 15% of the sum awarded for pain, suffering and loss of amenity.

## **UPDATE**

### **878-881 Introduction**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **879 General principles**

NOTE 6--As to the requirement to take into account a voluntary payment made by a tortfeasor to a plaintiff when assessing damages, see *Williams v BOC Gases Ltd* [2000] ICR 1181, CA: PARA 900.

TEXT AND NOTE 11--In an assault case damages for injury to feelings should be awarded as general rather than aggravated damages: *Richardson v Howie* [2004] EWCA Civ 1127, (2004) Times, 10 September.

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### **880. Special and general damages.**

Special damages mean the actual pecuniary loss suffered by the plaintiff up to the date of the trial resulting from the wrongful act of the defendant<sup>1</sup>. They must be specifically pleaded<sup>2</sup>. The plaintiff is entitled to interest on special damages between the date of the accident and the date of trial or assessment.

General damages are those losses which are not capable of precise quantification: future pecuniary loss, and past and future non-pecuniary loss. General damages do not need to be specifically pleaded. However, the plaintiff must plead any material facts giving rise to a claim for general damages, and must provide such evidence as is necessary and appropriate to support such a claim<sup>3</sup>.

1 *Jefford v Gee* [1970] 2 QB 130, [1970] 1 All ER 1202, CA.

2 See PARA 1146 post. Where this requirement is not complied with, the court may make an order to specify service, to dispense with service or to stay proceedings: see RSC Ord 18 r 12(1B); CCR Ord 6 r 1(6).

3 Late disclosure of information relating to special damages may lead to the trial being adjourned on the ground that the defendants would not have the opportunity to defend the claim in an adequate manner, and the possibility of a wasted costs order against the plaintiff's solicitors: *Brown v BM Group plc* (12 July 1996, unreported), CA.

### **UPDATE**

#### **878-881 Introduction**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(i) Introduction/881. Calculating future pecuniary loss; the multiplier and the multiplicand.

### **881. Calculating future pecuniary loss; the multiplier and the multiplicand.**

Where a future pecuniary loss, such as loss of earnings or the need for medical care, is likely to last for a number of years, or extend for the rest of the plaintiff's life, that loss will be capitalised and awarded as a lump sum<sup>1</sup>. In order to calculate that lump sum, the net annual loss is calculated: the computation commences with what would have been the net earnings of the plaintiff at the time of the trial, not of the tort<sup>2</sup>. Earnings include not only wages and salary, but also fees<sup>3</sup>, profit sharing<sup>4</sup> and benefits in kind<sup>5</sup>. Account must be taken of any deductions which fall to be made<sup>6</sup> and, in the case of lost earnings, any lost promotion prospects<sup>7</sup>. This net annual loss figure provides the multiplicand, the starting point for the calculation of future loss<sup>8</sup>. Where medical evidence indicates that the need for care may increase or decrease over time, it will be necessary to take different multiplicands for the different periods covered by the award<sup>9</sup>.

The multiplicand must be multiplied by the multiplier<sup>10</sup>. The plaintiff is expected to invest the money prudently, and the level of the multiplier is determined in accordance with this expectation. Whereas previously 'prudent investment' meant a duty to invest in equities, and the discount rate to be applied (usually 4.5 per cent) was that appropriate to the return to be expected on equities, the courts now recognise that, for a personal injury victim, prudent investment requires a less risky form of investment. The multiplier is now based on the assumption that a plaintiff will invest the lump sum awarded in Index Linked Government Securities. The net discount rate to be adopted on this basis is currently 3 per cent<sup>11</sup>. In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court must, subject to and in accordance with the rules of court made for these purposes<sup>12</sup>, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor<sup>13</sup>.

The appropriate multiplier is determined by taking into account a number of factors. The first relevant factor is the number of years for which the loss or disability is expected to last: in the case of lost earnings, the loss may be expected to last up to the date when the plaintiff would have taken retirement, and in the case of permanent disability requiring nursing care, the multiplier must reflect the plaintiff's life expectancy. Where the plaintiff's life expectancy has been reduced by reason of his injuries, the multiplier is calculated according to his life expectancy prior to the accident<sup>14</sup>. It has been the practice of the court to reduce the multiplier to take account of the fact that the plaintiff receives the money as a lump sum rather than as periodic payments over the rest of his life, and also to take account of the vicissitudes and contingencies of life (for example, death from a cause unrelated to his injuries or possible redundancy), but it appears that this should no longer occur<sup>15</sup>. Exceptionally, the uncertainty may be so great that the multiplier method cannot be used<sup>16</sup>. Where it is used, an overall discount will be applied to the multiplier to offset the advantage resulting from the fact that the plaintiff will be receiving the damages far earlier than the earnings would have been received<sup>17</sup>. The younger the plaintiff, the heavier will be this discount<sup>18</sup>.

Where, prior to the accident, a plaintiff was suffering from a condition which might have curtailed his ability to work in the future, the multiplier may be considerably reduced to take this probability into account<sup>19</sup>. In practice, the maximum multiplier applied by the courts is around 18<sup>20</sup>. For a plaintiff between the age of 30 and 40 years, having a normal expectation of working life, a multiplier of 14 or 15 has often been taken.

At one time, the use of actuarial evidence in these computations was rejected by the courts on the ground that it was directed to averages not individual cases<sup>21</sup>, but such evidence is now accepted<sup>22</sup>. The rate of 3 per cent takes into account taxation at standard rates. In exceptional cases, where a very high award of damages will lead to the imposition of a higher rate of tax, it is open to plaintiffs to place before the court their arguments for a rate lower than 3 per cent in order to compensate for the higher level of taxation<sup>23</sup>.

1 On the approach to the basic calculation of the lump sum see, inter alia, *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1998] 3 WLR 329, HL; *Todorovic v Waller* (1981) 37 ALR 481 at 498 per Stephen J; *Taylor v O'Connor* [1971] AC 115 at 140, [1970] 1 All ER 365 at 377, HL, per Lord Pearson.

2 *Cookson v Knowles* [1979] AC 556, [1978] 2 All ER 604, HL (fatal accidents, but the same principle applies); *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, [1979] 2 All ER 910, HL.

3 *Phillips v London and South Western Rly* (1879) 5 CPD 280, CA.

4 *Bellingham v Dhillon* [1973] QB 304, [1973] 1 All ER 20; *Lee v Sheard* [1956] 1 QB 192, [1955] 3 All ER 777, CA. Where the profits from a partnership are shared between a number of partners, including the plaintiff, the court will look to the reality of the plaintiff's contribution when determining the damages payable in respect of loss of profits, rather than to the notional division of profits amongst the partners: *Ward v Newalls Insulation Co Ltd* [1998] 2 All ER 690, (1998) Times, 5 March, CA.

5 *Kennedy v Bryan* (1984) Times, 3 May.

6 See PARA 900 et seq post.

7 *Mitchell v Mulholland (No 2)* [1972] 1 QB 65, [1971] 2 All ER 1205, CA; *Roach v Yates* [1938] 1 KB 256, [1937] 3 All ER 442, CA. See also *Hoffman v Sofaer* [1982] 1 WLR 1350.

8 The House of Lords has stressed the importance of retaining firm control of the multiplicand, particularly in light of the reduction in the rate of discount from 4.5% to 3% (as to which see infra): *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1998] 3 WLR 329, HL.

9 Where medical evidence indicates that the need for care may increase or decrease over time, it will be necessary to take different multipliers and multiplicands for the different periods covered by the award: see *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1998] 3 WLR 329, HL.

10 '[The function of an annual sum is] first to convert one or more annual sums, that is, items of expenditure, into a single capital sum. It is, secondly, to allow for the advancement of the payment or payments that are being made. It is, thirdly, to allow for contingencies and other adjusting factors to be taken into account': *Willett v North Bedfordshire Health Authority* [1993] PIQR Q166 at Q167-168 per Hobhouse J.

11 *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481 at 495, [1998] 3 WLR 329, HL, per Lord Lloyd of Berwick. The net discount rate was previously 4-5%, based on the assumption that the prudent plaintiff would invest a lump sum award of damages in a mixture of equities and gilts. This expectation no longer applies: *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* supra. This may not apply to the calculation of damages paid under a structured settlement: *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* supra. As to structured settlements see PARAS 925, 931 post.

12 Ie for the purposes of the Damages Act 1996 s 1(1): see note 13 infra.

13 Ibid s 1(1). Section 1(1) does not, however, prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question: s 1(2).

An order under s 1(1) may prescribe different rates of return for different classes of case: s 1(3). Before making such an order, the Lord Chancellor must consult the government actuary and the Treasury; and any such order must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 1(4). At the date at which this volume states the law, no such order had been made.

14 *Pickett v British Rail Engineering Ltd, British Rail Engineering Ltd v Pickett* [1980] AC 136, [1979] 1 All ER 774, HL; overruling *Oliver v Ashman* [1962] 2 QB 210, [1963] 3 All ER 323, CA.

15 *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1998] 3 WLR 329, HL.

16 *Blamire v South Cumbria Health Authority* [1993] PIQR Q1, CA. The court will require clear evidence that the uncertainties of the case are of sufficient magnitude before it will depart from the normal multiplier/multiplicand method of assessing future loss: *Roy v Tappex Thread Inserts Ltd* (18 June 1998, unreported), CA. See further *Meah v McCremer* [1985] 1 All ER 367, 135 NLJ 80; *Hassall v Secretary of State for Social Security* [1995] 3 All ER 909, [1995] 1 WLR 812, CA (method inapplicable as no prospects of employment).

17 *Taylor v O'Connor* [1971] AC 115, [1970] 1 All ER 365, HL.

18 *Croke v Wiseman* [1981] 3 All ER 852, [1982] 1 WLR 71, CA; *Almond v Leeds Western Health Authority* [1990] 1 Med LR 370; *Cassel v Riverside Health Authority* [1991] PIQR Q168, CA; *Taylor v British Omnibus Co* [1975] 2 All ER 1107, [1975] 1 WLR 1054, CA.

19 *Page v Smith (No 2)* [1996] 3 All ER 272, CA (plaintiff suffering from myalgic encephalomyelitis prior to an accident with a high likelihood of future recurrences during which he would be unable to work: multiplier of 10 reduced to 6 to take account of this).

20 See *McIlgrew v Devon County Council* [1995] PIQR Q66, CA, where the plaintiff was aged 30 at the date of trial and was unlikely to work again: the maximum multiplier of 18 was applied for permanent general losses, with a multiplier of 12 for loss of earnings.

21 *Auty v National Coal Board* [1985] 1 All ER 930, [1985] 1 WLR 784, CA.

22 *Hunt v Severs* [1994] 2 AC 350, [1994] 2 All ER 385, HL.

23 *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481 at 506, [1998] 3 WLR 329 at 355, HL, per Lord Steyn; approving *Hodgson v Trapp* [1989] AC 807 at 835 per Lord Oliver.

## UPDATE

### 878-881 Introduction

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 881 Calculating future pecuniary loss; the multiplier and the multiplicand

NOTE 1--*Wells*, cited, also applies in Scotland: *McNulty v Marshall's Food Group Ltd* (1999) Times, 7 January, OH.

NOTES 11-13--The reduction in the return rate of index-linked government securities since *Wells v Wells*, cited, is not a sufficient change of economic circumstances to justify a change in the guideline discount rate before the Lord Chancellor has set a rate pursuant to the Damages Act 1996 s 1(1): *Warren v Northern General Hospital Trust (No 2)* [2000] 1 WLR 1404, CA. See also *Macey-Lillie v Lanarkshire Health Board* (2000) Times, 28 June, OH; *Barry v Ablere Construction (Midlands) Ltd* [2001] All ER (D) 251 (Mar), CA.

NOTE 11--Following the decision in *Wells*, cited, the 'Ogden' Working Party has recommended that the net discount rate ought to be 2 per cent: *Note (Ogden Tables)* (1999) Times, 3 May. Costs of investment advice and fund management charges relating to the management of the award are factored into the discount rate and are not recoverable separately: *Page v Plymouth Hospitals NHS Trust* [2004] EWHC 1154 (QB), [2004] 3 All ER 367; *Eagle v Chambers* [2004] EWCA Civ 1033, [2005] 1 All ER 136.

NOTE 13--See the Damages (Personal Injury) Order 2001, SI 2001/2301, which prescribes a rate of return of 2.5 per cent. Only where a case falls into a category not considered by the Lord Chancellor in setting the discount rate may the court consider applying a different rate to that set by SI 2001/2301: *Warriner v Warriner* [2002] EWCA Civ 81, [2003] 3 All ER 447; applied in *Cooke v United Bristol Health Care; Sheppard v Stibbe; Page v Lee* [2003] EWCA Civ 1370, [2004] 1 All ER 797.

NOTE 14--The fact that a foreign claimant might be liable to pay more tax does not in itself make the case exceptional or justify the increasing of the multiplier: *Van Oudenhoven v Griffin Inns Ltd* [2000] 1 WLR 1413, CA.

NOTE 15--Cf *Heil v Rankin* [2001] PIQR Q16, CA (no general rule, when assessing damages for personal injury, that future tortious acts must be ignored).

NOTE 16--See also *Chase International Express Ltd v McRae* [2003] EWCA Civ 505, [2004] PIQR P314 (multiplier/multiplicand method of assessing future loss inappropriate as no evidence of claimant's pre-accident employment history).

NOTE 22--The starting point for determining a multiplier based on life expectancy should be tables 11 to 20 of the Actuarial Tables with Explanatory notes for use in Personal Injury and Fatal Accident cases, published by the Government Actuary's Department: *Worrall v Powergen plc* (1999) Times, 10 February.



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## **(ii) Heads of Damage**

### **A. NON-PECUNIARY LOSS**

#### **882. In general.**

The principles governing recovery of damages in respect of non-pecuniary losses (that is those losses which are not susceptible to measurement in money) are as follows: the figure awarded must be basically a conventional figure derived from awards in comparable cases and the damages must be assessed by reference to the value of money at the date of trial and not at some other and lower sum calculated by reference to an earlier and higher value of the pound<sup>1</sup>. Damages for the two principal heads of non-pecuniary loss, loss of amenity and pain and suffering<sup>2</sup>, are usually made as a global award<sup>3</sup>.

<sup>1</sup> *Wright v British Railways Board*[1983] 2 AC 773 at 777-778, [1983] 2 All ER 698 at 700, HL, per Lord Diplock.

<sup>2</sup> Damages for loss of expectation of life are no longer recoverable: see the Administration of Justice Act 1982 s 1(1)(a). If, however, the injured person's expectation of life has been reduced by the injuries, the court, in assessing damages in respect of pain and suffering caused by the injuries, must take account of any suffering caused or likely to be caused to him by awareness that his expectation of life has been so reduced: s 1(1)(b). The reference in s 1(1)(a) to damages in respect of loss of expectation of life does not include damages in respect of loss of income: s 1(2).

<sup>3</sup> *H West & Son Ltd v Shephard*[1964] AC 326 at 365, [1963] 2 All ER 625 at 643 per Lord Pearce, HL; *Fletcher v Autocar and Transporters Ltd*[1968] 2 QB 322 at 336, [1968] 1 Lloyd's Rep 317 at 320, CA, per Lord Denning MR, at 341 and 323 per Diplock LJ, and at 364 and 335 per Salmon LJ.

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### 883. Pain and suffering.

Damages are awarded for the physical and mental distress caused to the plaintiff, both pre-trial and in the future, as a result of the injury<sup>1</sup>. This includes pain caused by the injury itself<sup>2</sup> and any treatment intended to alleviate it; the awareness of and embarrassment at the disability or disfigurement<sup>3</sup>, or suffering caused by anxiety that the plaintiff's condition may seriously deteriorate<sup>4</sup>. It may also include cases where the plaintiff is distressed at not being able to perform services for a sick relative<sup>5</sup> or at the knowledge that she will leave her young child motherless<sup>6</sup>. Pain and suffering must be proved and, where the plaintiff has died as a result of his injuries, identified as an element separate from the death itself<sup>7</sup>. An award under this head depends on the plaintiff's awareness of his suffering: pain and suffering, unlike loss of amenity, is a subjective loss<sup>8</sup>. Where the plaintiff's life expectancy has been reduced by reason of his injuries, the courts must, in assessing damages for pain and suffering, take into account any suffering caused or likely to be caused to the plaintiff by awareness that his expectation of life has been reduced<sup>9</sup>.

1 When assessing the damages for pain and suffering, regard will generally be had to the Judicial Studies Board publication *Guidelines for the Assessment of General Damages in Personal Injury Cases* (3rd Edn, 1996) in order to compensate like with like.

2 *Kralj v McGrath* [1986] 1 All ER 54 (defendant's negligence during delivery of plaintiff's child caused plaintiff excruciating pain). A period of pain and suffering as short as two hours may give rise to a claim under this head: *Knight v West Kent Health Authority* (1997) 40 BMLR 61, CA.

3 *Dimmock v Miles* (1969, unreported), CA (scarring case).

4 *Church v Ministry of Defence* (1984) 134 NLJ 623 (plaintiff had developed asbestos pleural disease as a result of the defendants' negligence and was awarded £1,500 damages for the anxiety caused by the increased risk that he would develop asbestosis).

5 *Rourke v Barton* (1982) Times, 23 June (plaintiff sustained an injury which prevented her from nursing her husband who was suffering from terminal cancer).

6 *Jefferson v Cape Insulation* (1981) Times, 3 December.

7 *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65, (1992) Times, 9 March, HL, where an action claiming damages for personal injury was brought by the parents of two girls who sustained fatal crushing injuries at the Hillsborough Stadium in 1989; no damages for pain and suffering were awarded since it was not established that any physical injury was caused before the fatal crushing injury.

8 *Wise v Kaye* [1962] 1 QB 638, [1962] 1 All ER 257, CA; *H West & Son Ltd v Shephard* [1964] AC 326 at 349, [1963] 2 All ER 625 at 633, HL, per Lord Morris; *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 at 188, [1979] 2 All ER 910 at 918-919, HL, per Lord Scarman.

9 See the Administration of Justice Act 1982 s 1(1)(b); and PARA 882 note 2 ante.

## UPDATE

### 883 Pain and suffering

NOTE 1--See *Reed v Sunderland Health Authority* (1998) Times, 16 October, CA.

As to guidelines on the measure of damages for pain, suffering and loss of amenity, see *Heil v Rankin*; *Rees v Mabco (102) Ltd (in liquidation)*; *Schofield v Saunders and Taylor Ltd*; *Ramsay v Rivers*; *Kent v Griffiths (No 2)*; *Warren v Northern General Hospital NHS Trust*; *Annable v Southern Derbyshire Health Authority*; *Connolly v Tasker* [2001] QB 272, [2000] 3 All ER 138, CA (modest increase in level of awards required). See also *C v A Local Authority* [2001] EWCA Civ 302, [2001] 1 FCR 614 (guidelines not appropriate in cases of physical, emotional and sexual abuse).

NOTE 4--As to further guidance on liability in respect of the formation of pleural plaques as a result of negligent exposure to asbestos see *Rothwell v Chemical & Insulating Co Ltd, Re Pleural Plaques Litigation* [2007] UKHL 39, [2007] 4 All ER 1047, [2007] 3 WLR 876.

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### **884. Loss of amenity.**

In addition to damages for the subjective pain and suffering sustained by a plaintiff by reason of his injuries, damages are awarded for the objective<sup>1</sup> losses thereby sustained by him. These may include loss of the ability to walk or see, the loss of a limb or its use<sup>2</sup>, the loss of congenial employment<sup>3</sup>, the loss of pride and pleasure in one's work<sup>4</sup>, loss of marriage prospects<sup>5</sup> and loss of sexual function<sup>6</sup>. Damages under this head will be awarded whether the plaintiff is aware of the loss or not: damages are awarded for the fact of the deprivation, rather than for the awareness of it<sup>7</sup>. While the award of damages itself under this head is objective and its calculation proceeds on the basis of previous similar awards, the precise quantum is subjective: the courts must assess the effect of the loss on the particular plaintiff. Previous awards, updated to allow for inflation where appropriate<sup>8</sup>, provide the starting point for the calculation of damages<sup>9</sup>.

1 Although the criterion is objective in the sense that the plaintiff need not be aware of the fact that he has suffered this loss of amenity, subjective factors, such as lost amenities particular to the individual plaintiff, eg a hobby or sport, may be taken into account when determining the level of the award: see *H West & Son Ltd v Shephard* [1964] AC 326 at 365, [1963] 2 All ER 625 at 643, HL, per Lord Pearce.

2 *Hunt v Severs* [1994] 2 AC 350, [1994] 2 All ER 385, HL (paralysis); *Frost v Palmer* [1993] PIQR Q14, CA (no amputation).

3 *Morris v Johnson Matthey & Co* (1967) 112 Sol Jo 32, CA; *Hale v London Underground Ltd* [1993] PIQR Q30; *Davies v Mersey Regional Ambulance Service NHS Trust* (11 March 1998, unreported), CA.

4 *Morris v Johnson Matthey & Co* (1967) 112 Sol Jo 32, CA.

5 *Moriarty v McCarthy* [1978] 2 All ER 213, [1978] 1 WLR 155; *Hughes v McKeown* [1985] 3 All ER 284, [1985] 1 WLR 963; *Housecroft v Burnett* [1986] 1 All ER 332, CA.

6 *Cook v JL Kier & Co Ltd* [1970] 2 All ER 513, [1970] 1 WLR 774, CA; *Hale v London Underground Ltd* [1993] PIQR Q30.

7 *H West & Son Ltd v Shephard* [1964] AC 326, [1963] 2 All ER 625, HL; affd in *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, [1979] 2 All ER 910, HL.

8 '[There is] a flexible judicial tariff, which judges will use as a starting point in each individual case, but never in itself decisive of any case': *Pickett v British Rail Engineering Ltd, British Rail Engineering Ltd v Pickett* [1980] AC 136 at 168, [1979] 1 All ER 774 at 796, HL, per Lord Scarman; *Wright v British Railways Board* [1983] 2 AC 773, [1983] 2 All ER 698, HL; *Housecroft v Burnett* [1986] 1 All ER 332, CA; cf *McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 All ER 854 at 855-857, [1990] 1 WLR 963 at 965-966, CA, per O'Connor LJ.

9 *Wright v British Railways Board* [1983] 2 AC 773, [1983] 2 All ER 698, HL. Reference may also be had to the Judicial Studies Board publication *Guidelines for Calculating General Damages* (3rd Edn, 1996), although the courts, and the Court of Appeal in particular, will not necessarily adhere to these Guidelines: 'In this Court we ought to look to the sources rather than the summary produced by the Judicial Studies Board': *Potter v Arafat* [1994] PIQR Q73 at Q79 per Staughton LJ. See also *McLaughlin v QDF Component* [1995] CLY 1820; *Wilson v Clarke* [1995] CLY 1696; *Re Matthews* [1995] CLY 1686; *Johnson v Edwards* [1995] CLY 1777.

## **UPDATE**

### **884 Loss of amenity**

NOTE 9--As to guidelines on the measure of damages for pain, suffering and loss of amenity, see *Heil v Rankin*; *Rees v Mabco (102) Ltd (in liquidation)*; *Schofield v Saunders and Taylor Ltd*; *Ramsay v Rivers*; *Kent v Griffiths (No 2)*; *Warren v Northern General Hospital NHS Trust*; *Annable v Southern Derbyshire Health Authority*; *Connolly v Tasker* [2001] QB 272, [2000] 3 All ER 138, CA. See also *C v A Local Authority* [2001] EWCA Civ 302, [2001] 1 FCR 614 (guidelines not appropriate in cases of physical, emotional and sexual abuse).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(ii) Heads of Damage/B. PECUNIARY LOSS/885. In general.

### ***B. PECUNIARY LOSS***

#### **885. In general.**

In the case of pecuniary loss, such as loss of profits or earnings, the principle of restitutio in integrum applies, and the plaintiff is entitled to be put in the position in which he would have been if the injury had not occurred<sup>1</sup>, though deductions may fall to be made for benefits received<sup>2</sup>, and as regards future loss the chances, both favourable and unfavourable, fall to be reflected in the award<sup>3</sup>.

1 *Livingstone v Rawyards Coal Co*(1880) 5 App Cas 25 at 39, HL, per Lord Blackburn; quoted with approval in *British Transport Commission v Gourley*[1956] AC 185 at 197, [1955] 3 All ER 796 at 799, HL, per Earl Jowitt.

2 See PARA 900 et seq post.

3 As to the assessment of future losses see PARA 887 et seq post.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(ii) Heads of Damage/B. PECUNIARY LOSS/886. Loss of earnings; pre-trial.

### **886. Loss of earnings; pre-trial.**

Pre-trial loss of earnings is assessed as the net sum which the plaintiff would have received after necessary deductions, for example, of income tax<sup>1</sup> and national insurance<sup>2</sup>; his loss is the disposable amount<sup>3</sup> which he would have left after those deductions which his employer is compelled by law to make or which the plaintiff, as a self-employed person, would be required to pay. Where the plaintiff's contract of employment provides for other deductions (for example, in respect of contributions to a pension scheme) these will be taken into account in assessing his net loss<sup>4</sup>. Any expenses normally incurred by the plaintiff in order to perform his job and not now incurred may be deducted from the award of damages<sup>5</sup>.

Where an employee continues to receive from his employer, as of right, his wages, this will fall to be deducted from his damages for loss of earnings<sup>6</sup>: any payments payable under a term of an employee's contract by the defendants to the employee as employee as a partial substitute for earnings must be deducted<sup>7</sup>. Where the plaintiff is entitled to payments under an insurance policy taken out by his employers, the defendants, these payments will be deducted from the award of damages since they are classified as sick pay rather than insurance, the plaintiff not having paid for them<sup>8</sup>.

The lost earnings are taken as representing the top slice of the plaintiff's total income, which portion would have been taxed at his highest rate<sup>9</sup>. Any tax rebate paid as a result of the plaintiff's absence from work as a result of his injuries will be deducted from his lost earnings<sup>10</sup>. Certain receipts are to be ignored when determining the plaintiff's net loss of earnings. These include money paid out under an insurance policy<sup>11</sup> since the plaintiff does not receive the money as a result of the injury, but because he has made a contract providing for payment in the event that injury should occur, and also because it would be unjust to permit the wrongdoer to take the benefit of the insurance premium paid by the plaintiff. This rule will also apply where the defendant employer has taken out a group personal injury accidents policy which benefits the plaintiff<sup>12</sup>.

The plaintiff will in all cases be entitled to damages representing his loss of earnings up to the date of trial, no matter how long has elapsed since the date of the accident. This is so notwithstanding the fact that the result may be, when combined with the operation of the multiplier and the multiplicand, to increase substantially the total sum awarded<sup>13</sup>.

1 *British Transport Commission v Gourley* [1956] AC 185, [1955] 3 All ER 796, HL. See further PARA 901 post.

2 *Cooper v Firth Brown Ltd* [1963] 2 All ER 31, [1963] 1 WLR 418 (a wrongful dismissal case).

3 *Dews v National Coal Board* [1988] AC 1, [1987] 2 All ER 545, HL.

4 *Dews v National Coal Board* [1988] AC 1, [1987] 2 All ER 545, HL. However, if the plaintiff has lost some entitlement to pension this reduction should be assessed separately and should form the subject of a separate award for damages.

5 In practice, however, such sums are rarely deducted. In *Dews v National Coal Board* [1988] AC 1, [1987] 2 All ER 545, HL it was noted that it would be intolerable to have an inquiry into travelling expenses in every personal injury action, and that employers and insurers should seek to deduct such expenses from the plaintiff's loss of earnings only where they 'loom so large an element in the damage that further consideration of the question would be justified as, for example, in the case of a wealthy man who commuted daily by helicopter from the Channel Islands to London': see at 13 and at 548 per Lord Griffiths.

6 *Hussain v New Taplow Paper Mills Ltd* [1988] AC 514 at 530, [1988] 1 All ER 541 at 547, HL, per Lord Bridge; *Metropolitan Police District Receiver v Croydon Corpn* [1957] 2 QB 154, [1957] 1 All ER 78, CA; *Parry v Cleaver* [1970] AC 1, [1969] 1 All ER 555, HL; *Turner v Ministry of Defence* (1969) 113 Sol Jo 585, CA. See PARA 900 et seq post.

7 *Hussain v New Taplow Paper Mills Ltd* [1988] AC 514 at 530, [1988] 1 All ER 541, HL.

8 *Page v Sheerness Steel Co* [1997] PIQR Q1, CA; unchanged on this point on appeal sub nom *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1998] 3 WLR 329, HL.

9 *Lyndale Fashion Manufacturers v Rich* [1973] 1 All ER 33, [1973] 1 WLR 73, CA.

10 *Hartley v Sandholme Iron Co Ltd* [1975] QB 600, [1974] 3 All ER 475.

11 *Bradburn v Great Western Rly Co* [1874] LR 10 Exch 1.

12 *McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 All ER 854, [1990] 1 WLR 963, CA.

13 *Pritchard v JH Cobden Ltd* [1987] 1 All ER 300, [1988] Fam 22, CA; *Hayes v Bowman* [1989] 2 All ER 293, [1989] 1 WLR 456, CA; *Doyle v Robinson* [1994] PIQR P59, CA. A defendant who argues that the action should be struck out for want of prosecution on the ground that he has suffered more than minimal prejudice as a result of the plaintiff's inordinate and inexcusable delay in the prosecution of his claim, which has resulted in a substantial increase in the quantum of damages to be awarded for loss of earnings, will be required to give credit for the value to the defendant of having in hand the money which, but for the delay, he would have had to pay to the plaintiff by way of damages: see *Gahan v Szerelmey (UK) Ltd* [1996] PIQR P83, CA, where the difference in quantum of the plaintiff's loss of earnings between the sum which would have been awarded had the case proceeded with reasonable progress and the date when the case was in fact now likely to be heard was in the region of £12,000 to £15,000.

## UPDATE

### 886 Loss of earnings; pre-trial

NOTE 12--*McCamley*, cited, disapproved in *Gaca v Pirelli General plc* [2004] EWCA Civ 373, [2004] 3 All ER 348, [2004] 1 WLR 2683 (payments to claimant pursuant to defendant employer's group personal accident insurance policy deductible from award of damages).



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(ii) Heads of Damage/B. PECUNIARY LOSS/887. Loss of earnings; future earnings.

### **887. Loss of earnings; future earnings.**

Deductions applicable to pre-trial loss of earnings apply also to future loss of earnings<sup>1</sup>. When calculating the capital sum representing the plaintiff's future loss of earnings, the courts take the plaintiff's net annual loss<sup>2</sup> of earnings<sup>3</sup> as the starting point for the multiplicand<sup>4</sup>. This sum is adjusted, by applying the principles applicable to loss of a chance, to take account of the likelihood or otherwise that the plaintiff would have been promoted<sup>5</sup>. Similarly, where the plaintiff argues that, but for the accident, he would have obtained alternative, more remunerative, employment, whether following a period of training or otherwise, the court must assess the loss of that chance<sup>6</sup>.

The courts will assess the loss of a chance of a job or promotion by taking the percentage chance that the plaintiff would have obtained the job or the promotion and awarding that percentage of the lost salary<sup>7</sup>. The resulting multiplicand is then multiplied by the multiplier, which is calculated in accordance with the principles outlined above<sup>8</sup> with reductions made to take into account the fact that the plaintiff receives a capital sum now, rather than spread over the years, and that the plaintiff may have lost his job or died. No deduction will be made to take account of intangible benefits which a plaintiff may receive in changing, by reason of his injuries, to a less onerous job with shorter working hours, provided the plaintiff has sought effectively to mitigate his loss in taking the second post<sup>9</sup>.

Where the plaintiff is a partner in a business, he is entitled to claim, in addition to his own loss of earnings, the cost of employing someone to perform his work<sup>10</sup>.

In the case of a young woman, a reduction has sometimes been made to reflect the fact that she would otherwise have had a number of years without earnings to raise a family<sup>11</sup>, but it is doubtful how far this would still apply in today's changing social and economic environment. Moreover, where a woman's injuries are of such a severity that she is unlikely to marry, no such deduction will be made from the multiplier<sup>12</sup>; nor will such a deduction be made in the situation where the woman's injuries are such that, in the event of her having children, she would require extensive assistance in caring for them<sup>13</sup>.

The aim is to provide a capital sum which, when invested, through drawings on both capital and interest, will produce an income equivalent to that lost. Special considerations apply when calculating the loss of earnings for young children<sup>14</sup>.

1 See PARA 900 et seq post.

2 The plaintiff is required to mitigate his loss by accepting reasonable, alternative offers of employment: see *Emblem v Ingram Cactus Ltd* (5 November 1997, unreported), CA. As to mitigation in tort see PARA 859 et seq ante.

3 In assessing the loss of earnings where the plaintiff is a partner in a business, the courts will look to the reality of the situation, rather than accepting artificial arrangements for distribution of profits: if the plaintiff contributes with a partner in equal shares towards the running of the business, the damages awarded will be 50% of the past and probable future loss to the partnership: see *Kent v British Railways Board* [1995] PIQR Q42, CA (reversing the trial judge's award of 100% of the loss to the partnership). Where one partner makes no contribution towards the running of the business, but draws a share of the profits see *Ward v Newalls Insulation Co Ltd* [1998] 2 All ER 690, CA (plaintiff in personal injury action was a successful businessman who, for tax purposes (and with the agreement of the Inland Revenue) divided profits of the business with his wife; the Court of Appeal rejected the defendant's argument that the damages to be awarded for loss of earning capacity should be limited to the amount which, for tax purposes, the plaintiff was deemed to take out of the business: in reality, the wife did not contribute to the profitability of the business, and her share of the profits was notional).

and related to the plaintiff's work and was therefore his loss). See also *Jason v Batten (1930) Ltd, Jason v British Traders' Insurance Co Ltd* [1969] 1 Lloyd's Rep 281; *Lee v Sheard* [1955] 3 All ER 777, [1956] 1 QB 192; *Taroperewall v Berkery* [1983] 3 NSWLR 28, NSW SC.

4 As to the use of the multiplicand and the multiplier generally see PARA 881 ante.

5 Even a small chance should not be disregarded when evaluating the damages to be awarded in respect of loss of a chance: see eg *Mallet v McMonagle* [1970] AC 166 at 176, [1969] 2 All ER 178 at 191, HL, per Lord Diplock (a small chance that the plaintiff (or the deceased in a claim under the Fatal Accidents Acts) would have become foreman, with increased wages, within five to ten years' time, was reflected in an additional award. A good chance that the plaintiff or deceased would have become managing director of a company in ten years' time may be reflected in a substantial award). As to loss of opportunity in contract see PARA 962 et seq post.

See *Anderson v Davis* [1993] PIQR Q87 (but for his injuries, the plaintiff would have had a two-thirds chance of obtaining promotion: award based on two-thirds of lost earnings); *Doyle v Wallace* (1998) Times, 22 July, CA (but for her injuries, the plaintiff might have qualified as a teacher; damages assessed by evaluating that chance as a percentage and awarding that percentage of the lost earnings).

6 *Doyle v Wallace* (1998) Times, 22 July, CA.

7 *Doyle v Wallace* (1998) Times, 22 July, CA. However, where the loss of a chance is exceptionally difficult to calculate, the court may depart from the normal multiplier/multiplicand basis of assessment and award a lump sum: *Doughty v Stena Offshore Ltd* (10 November 1997, unreported), CA.

8 As to the use of the multiplier and multiplicand see PARA 881 ante.

9 *Potter v Arafat* [1994] PIQR Q73, CA.

10 See *Ward v Newalls Insulation Co Ltd* [1998] 2 All ER 690, CA.

11 See eg *Moriarty v McCarthy* [1978] 2 All ER 213, [1978] 1 WLR 155.

12 *Hughes v McKeown* [1985] 3 All ER 284, [1985] 1 WLR 963. Damages in respect of loss of marriage prospects are not now generally awarded. Instead, and in order to avoid overlap, the court will assess the damages without reference to the fact that the plaintiff would have been likely, as a result of marriage and child-bearing, to have ceased work for a number of years.

13 *McIlgrew v Devon County Council* [1995] PIQR Q66, CA, where the plaintiff had sustained a severe back injury which meant that, if she had children, she would not be able to lift them and would require assistance for this: the need for assistance was held to cancel out any benefit to the defendant of the plaintiff being unavailable for work during the early child rearing years.

14 See PARA 889 post.

## UPDATE

### 887 Loss of earnings; future earnings

NOTES 5, 6--In determining an appropriate baseline for calculating the likely future earnings of a young claimant who is not in employment, or one who has taken time out from employment with a desire to change the direction of his career, it might be appropriate to select a specific career model in his chosen field: *Herring v Ministry of Defence* [2003] EWCA Civ 528, [2004] 1 All ER 44.

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### **888. Loss of earnings; the 'lost years'.**

Where a living plaintiff's expectation of life has been reduced by reason of his injuries, he is entitled to recover damages for his loss of earnings throughout both the period that he is likely to remain alive and also for the 'lost years' during which he would have lived but for his injuries<sup>1</sup>. In such a situation, a deduction must be made for the living expenses which the plaintiff would have incurred during the lost years in which he will not now be alive<sup>2</sup>.

If the plaintiff's own claim is disposed of in his lifetime by judgment or settlement<sup>3</sup>, or has become statute-barred before his death<sup>4</sup>, his dependants have no claim in respect of the same subject matter under the Fatal Accidents Act 1976; but if his claim is still alive at his death, then there can be an action for his pain and suffering and loss of amenity under the Law Reform (Miscellaneous Provisions) Act 1934, and also a fatal accident claim on behalf of the dependants<sup>5</sup>.

1 *Pickett v British Rail Engineering Ltd, British Rail Engineering Ltd v Pickett* [1980] AC 136, [1979] 1 All ER 774, HL, overruling *Oliver v Ashman* [1962] 2 QB 210, [1961] 3 All ER 323, CA, which denied recovery in respect of prospective earnings during the 'lost years'.

2 *Harris v Empress Motors Ltd* [1983] 3 All ER 561, [1984] 1 WLR 212, CA.

3 *Read v Great Eastern Rly Co* (1868) LR 3 QB 555. This may apply to an award of provisional damages under the Supreme Court Act 1981 s 32A (as added) (see PARA 930 post): *Middleton v Elliott Turbomachinery Ltd* (1990) Times, 29 October, CA.

4 *Williams v Mersey Docks and Harbour Board* [1905] 1 KB 804, CA; approved in *British Columbia Electric Rly Co Ltd v Gentile* [1914] AC 1034, PC.

5 Cf *Murray v Shuter* (1971) 115 Sol Jo 774, CA, where the court granted a six-month adjournment on the ground that if an action by a dying plaintiff in a coma were tried on the fixed date the fatal accident claim would become unavailable. Since the limitation period had not expired the plaintiff discontinued and started a new action, trial thus being postponed until after his death in 1973. See also *Jameson v Central Electricity Generating Board* [1998], [1997] 4 All ER 38, CA (full and final settlement with one concurrent tortfeasor did not release the other unless it amounted to satisfaction of full value of claim. As it did not, dependants could sue).

### **UPDATE**

### **888 Loss of earnings; the 'lost years'**

NOTE 3--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(ii) Heads of Damage/B. PECUNIARY LOSS/889. Loss of earnings; young children.

### **889. Loss of earnings; young children.**

When assessing the appropriate multiplicand to be applied to a young child who has never worked, the courts will take as the basis the national average earnings during early working life<sup>1</sup>. The courts may apply a higher multiplicand to a clearly intelligent child<sup>2</sup> or to one whose family background indicates that he would have been likely to enter a profession and earn an above average salary<sup>3</sup>.

Whereas previously the courts were reluctant to apply as high a multiplier in respect of loss of earnings as might have appeared warranted by the child's life expectancy, this is no longer the case. The court will now apply a multiplier which reflects the life expectancy and will not depart from the relevant actuarial multiplier on impressionistic grounds, or by reference to a spread of multipliers in comparable cases, especially when the multipliers were fixed before actuarial tables were widely used<sup>4</sup>.

1 *Croke v Wiseman* [1981] 3 All ER 852, [1982] 1 WLR 71, CA; but see note 4 infra.

2 *Almond v Leeds Health Authority* [1990] 1 Med LR 370, where the plaintiff, aged ten at the date of trial, had sustained birth injuries resulting in severe mobility and speech problems but was clearly of above average intelligence and was likely to undertake further education but unlikely, because of his injuries, to obtain employment: the multiplicand was assessed by taking the national average salary for non-manual males and increasing it by 50%. See also *Taylor v Glass* [1979] CLY 672.

3 *Harris v Harris* [1973] 1 Lloyd's Rep 445, CA; *Janardan v East Berkshire Health Authority* [1990] 2 Med LR 1, CA, where the plaintiff sustained brain damage as a result of the defendant's negligence at his birth: it was likely that he would have earned £18,884 pa, giving a net income and multiplicand of £13,443; *Cassel v Hammersmith and Fulham Health Authority* [1992] PIQR Q1, Q168 where, in assessing the multiplicand for an eight year old plaintiff who had sustained severe brain damage at birth, the family background was taken into account, which indicated that he would have been likely to have a successful entrepreneurial or professional career earning approximately 2.5 times the national average, and also it was considered that he would have been likely to increase his assets by prudent investment as well as employment: a multiplicand of £35,000 net, representing a gross income of about £55,000 was applied. See, however, note 4 infra.

4 *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1998] 3 WLR 329 HL, per Lord Lloyd of Berwick, substituting a multiplier of 26.58 for the judge's 23 and the Court of Appeal's 17. Cases such as *Croke v Wiseman* [1981] 3 All ER 852, [1982] 1 WLR 71, CA (multiplier for a child aged seven and expected to live to 40 was 5) and *Cassel v Hammersmith and Fulham Health Authority* [1992] PIQR Q1, [1992] PIQR Q168, CA (multiplier of 10 applied for a plaintiff aged eight at the date of trial and expected to live to 60) were overruled.

## **UPDATE**

### **889 Loss of earnings; young children**

NOTE 4--See *Royal Victoria Infirmary & Associated Hospitals NHS Trust v B (A Child)* [2002] EWCA Civ 348, [2002] PIQR Q137 (determination of claimant's life expectancy was subjective decision for judge alone).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(ii) Heads of Damage/B. PECUNIARY LOSS/890. Loss of earning capacity.

### **890. Loss of earning capacity.**

Where the injured plaintiff has not at the date of trial sustained a loss of or reduction in his earnings, he may still claim an award of damages if his injuries make it more likely that he will lose his job and that any job he may subsequently find will be less well paid<sup>1</sup>. Such an award is to compensate him for the weakening of his competitive position in the open labour market<sup>2</sup>. These awards are not generally calculated according to the usual multiplier and multiplicand formula<sup>3</sup>, although it may appear appropriate, in the circumstances of a given case, to use it<sup>4</sup>. Instead, the court will look at the weakness 'in the round', take note of the various contingencies and do its best to reach an assessment which will do justice to the plaintiff<sup>5</sup>. The courts will take into account:

- 8 (1) whether there is a real risk that the plaintiff will be forced onto the labour market before retirement age<sup>6</sup>;
- 9 (2) the extent of his injury or disability;
- 10 (3) how long it would take him to find alternative employment if forced onto the labour market;
- 11 (4) the reduction in salary which he would suffer thereby.

There is no limit on the amount that may be awarded on this basis<sup>7</sup>. In some instances, loss of future earnings may overlap with an award for loss of earning capacity<sup>8</sup>, but it is generally desirable to assess reduction in earning capacity separately from loss of earnings<sup>9</sup>. While it is generally advisable specifically to plead such damages, it will not be fatal to the plaintiff's claim if they are not so pleaded, provided it is apparent from the claim that the plaintiff has sustained a handicap in the labour market which should be compensated<sup>10</sup>.

1 *Smith v Manchester Corpn* (1974) 17 KIR 1, 118 Sol Jo 597, CA; *Nicholls v National Coal Board* [1976] ICR 266, CA; *Moeliker v A Reyrolle & Co Ltd* [1977] 1 All ER 9, [1977] 1 WLR 132, CA. An award of damages on this basis is commonly referred to as a 'Smith and Manchester award'. Damages may be awarded under this head even where the plaintiff's earnings at the date of trial are higher than at the date of the accident: *Lau Ho Wah v Yau Chi Biu* [1985] ICR 856, [1985] 1 WLR 1203, PC. In order for damages to be recoverable under this head, there must be a real or substantial risk of the plaintiff losing his job at some point in the future: see *Moeliker v A Reyrolle & Co Ltd* supra. Such a risk may be present even where the employer has undertaken to keep the plaintiff in employment: *Nicholls v National Coal Board* supra. Such an award will be made only where the handicap is likely to be permanent: where it will ultimately disappear, it is necessary to compensate the plaintiff for any reduction in salary in the meantime: see *Hulbert v Brooks Cleaning Services Ltd* (25 May 1994, unreported), CA.

2 *Smith v Manchester Corpn* (1974) 17 KIR 1, 118 Sol Jo 597, CA, per Scarman LJ.

3 A 'broad brush' approach may be adopted in estimating the loss of future earnings and the plaintiff's vulnerability in the labour market: *Goldborough v Thompson and Crowther* [1996] PIQR Q86, CA. See also *Page v Enfield and Haringey Area Health Authority* (1986) Times, 7 November, CA; *Davies v Mersey Regional Ambulance Service NHS Trust* (11 March 1998, unreported), CA.

4 *Tait v Pearson* [1996] PIQR Q92, CA.

5 *Smith v Manchester Corpn* (1974) 17 KIR 1, 118 Sol Jo 597, CA, per Scarman LJ; see also *Moeliker v Reyrolle & Co Ltd* [1977] 1 All ER 9, [1977] 1 WLR 132, CA, where the court rejected the calculation of such damages on the basis of a 'mathematical exercise'.

6 See *Robson v Liverpool City Council* [1993] PIQR Q78 at Q82, CA, per Neill LJ.

7 *Foster v Tyne and Wear County Council* [1986] 1 All ER 567, CA, where a 35 year old HGV driver with a serious ankle injury was awarded £35,000: five times his net annual salary. See also *Forey v London Buses* [1992] PIQR P48, [1991] 2 All ER 936; *Hale v London Underground* [1992] PIQR Q30.

8 See eg *Mulry v William* [1992] PIQR Q24 (global £20,000 for the plaintiff's loss of future earnings and Smith and Manchester damages).

9 *Cook v Consolidated Fisheries Ltd* [1977] ICR 635, CA.

10 See *Thorn v Powergen Plc* [1997] PIQR Q71, CA.

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**891. Loss of housekeeping ability.**

Where the plaintiff has suffered an impairment of his ability to perform household chores, that loss will be assessed on the basis of the cost of employing a housekeeper to perform them<sup>1</sup>, even though the plaintiff may choose not to employ a housekeeper<sup>2</sup>.

Where a member of the plaintiff's family voluntarily undertakes to perform the chores previously performed by the plaintiff, the plaintiff is entitled to an award of damages representing the value of those services<sup>3</sup>. Where, prior to the accident, the plaintiff performed an unfair proportion of the household chores, he will not be entitled to damages representing the full amount of those chores actually performed, only those which could fairly be said to represent the plaintiff's share of such chores<sup>4</sup>.

1 *Daly v General Steam Navigation Co Ltd* [1980] 3 All ER 696, [1981] 1 WLR 120, CA.

2 *Daly v General Steam Navigation Co Ltd* [1980] 3 All ER 696 at 701, [1981] 1 WLR 120 at 127, CA, per Bridge LJ.

3 *Hodges v Frost* (1983) 53 ALR 373, Aust Fed Ct.

4 *Shaw v Wirral Health Authority* [1993] 4 Med LR 275.

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**892. Loss of pension rights.**

Where the plaintiff's injury has resulted in the loss of his pension rights or in his entitlement to a lower pension than would otherwise have been the case, he is entitled to compensation for that loss<sup>1</sup>.

<sup>1</sup> See *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, [1979] 2 All ER 910, HL; *Auty v National Coal Board* [1985] 1 All ER 930, [1975] 1 WLR 784, CA.



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**893. Expenditure generally.**

The plaintiff is entitled to recover expenditure which has been reasonably incurred as a result of the injury. Such reasonable expenditure may include medical and nursing expenses<sup>1</sup>, the cost or value of carers<sup>2</sup> (including in some cases unpaid care<sup>3</sup>), special equipment<sup>4</sup>, and the cost of travel to and from hospital (for the plaintiff and his family<sup>5</sup>).

1 See PARA 894 post.

2 See PARA 894 post.

3 See PARA 898 post.

4 See PARA 895 post.

5 *Kirkham v Boughey* [1958] 2 QB 338, [1957] 3 All ER 153.

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#### **894. Medical and nursing care.**

In an action for damages for personal injuries<sup>1</sup> there must be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of the facilities available under the National Health Service<sup>2</sup>. The plaintiff will be required to establish that any medical expenses claimed were reasonably incurred<sup>3</sup>. However, if the plaintiff chooses to avail himself of the National Health Service, he will not recover a sum equivalent to what he would have been obliged to pay had he had private treatment<sup>4</sup>.

Where, as a result of his injuries, the plaintiff is cared for in a private hospital or nursing home, his ordinary living expenses will be deducted from the cost of such care<sup>5</sup>. Where the plaintiff is cared for by the National Health Service, any saving to the plaintiff as a result of such care will be set off against any income lost by him as a result of his injuries<sup>6</sup>.

In determining the appropriate lump sum to be awarded in respect of medical and nursing care, recourse is had to the multiplier and multiplicand<sup>7</sup>. A whole-life multiplier will be applied to such costs, as opposed to the shorter working-life multiplier<sup>8</sup>.

Whereas there may be room for a judicial discount when calculating the loss of future earnings, where contingencies may affect the result<sup>9</sup>, there is no room for any discount in the case of a whole-life multiplier with an agreed expectation of life.

1 See the Law Reform (Personal Injuries) Act 1948 s 2(4) (amended by the National Health Service Act 1977 s 129, Sch 15 para 8; and by the National Health Service (Scotland) Act 1978 Sch 16); *Harris v Bright's Asphalt Contractors Ltd* [1953] 1 QB 617, [1953] 1 All ER 395; *Woodrup v Nicol* [1993] PIQR Q104, CA; *Cunningham v Kensington and Chelsea and Westminster Health Authority* (2 May 1997, unreported), QBD (plaintiff suffering from severe brain damage and requiring constant supervision and nursing: costs of care in nursing home allowed notwithstanding fact that it was more expensive than a home funded by a charitable body in association with the NHS. However, the costs of home visits for the plaintiff were not recoverable since she was not aware of her surroundings and would not therefore benefit from these visits).

2 *Rialas v Mitchell* (1984) 128 Sol Jo 704, CA (cost of caring for the plaintiff at home was substantially greater than the cost of caring for him in an institution: burden was on the plaintiff to prove that it was reasonable for him to be cared for at home). Such 'reasonable' expenditure may include medical treatment in another country: *Winkworth v Hubbard* [1960] 1 Lloyd's Rep 150; *Hamp v Sisters of St Josephs Hospital Mount Carmel Convent School* [1972] CLY 895; *Roberts v Roberts* (1960) Times, 11 March.

3 *Harris v Bright's Asphalt Contractors Ltd* [1953] 1 QB 617 at 635, [1953] 1 All ER 395 at 402 per Slade LJ; *Cunningham v Harrison* [1973] QB 942, [1973] 3 All ER 463, CA; *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, [1979] 2 All ER 910, HL.

4 *Shearman v Folland* [1950] 2 KB 43, CA; *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, [1979] 2 All ER 910, HL.

5 See the Administration of Justice Act 1982 s 5, reversing *Daish v Wauton* [1972] 2 QB 262, [1972] 1 All ER 25, CA.

6 *Mitchell v Mulholland (No 2)* [1972] 1 QB 65, [1971] 2 All ER 1205, CA. As to the use of the multiplier and multiplicand see PARA 881 ante.

7 See *McIlgrew v Devon County Council* [1995] PIQR Q66, CA; *Cassel v Riverside Health Authority* [1992] PIQR Q168, CA.

8 *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1998] 3 WLR 329, HL.

9 *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1998] 3 WLR 329, HL; disapproving *Janardan v East Berkshire Health Authority* [1990] 2 Med LR 1.

## **UPDATE**

### **894 Medical and nursing care**

TEXT AND NOTES--National health service costs may be recovered from a person making a compensation payment to an injured person who has received treatment for his injuries at a health service hospital and/or been provided with NHS ambulance services: see the Health and Social Care (Community Health and Standards) Act 2003 Pt 3 (ss 150-169); and HEALTH SERVICES vol 54 (2008) PARAS 486-502.

NOTE 1--1948 Act s 2(4) further amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 11.

NOTE 3--Where the claimant is unable to have children as a result of the defendant's negligence, damages for the cost of a surrogacy procedure will not be awarded if the chance of success is small: *Briody v St Helen's & Knowsley Area Health Authority* [2001] EWCA Civ 1010, [2001] 2 FCR 481.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(ii) Heads of Damage/B. PECUNIARY LOSS/895. Accommodation and equipment.

### **895. Accommodation and equipment.**

Where, as a result of his injuries, the plaintiff requires special accommodation, the additional cost of that accommodation is recoverable in an award of damages<sup>1</sup>. The plaintiff is entitled to recover the costs associated with adapting the premises. Where the plaintiff purchases rather than rents accommodation suited to his disability, he is not entitled to damages representing the full extra cost of purchasing that accommodation, since he retains the capital in the form of the house<sup>2</sup>. In such a case, a discount rate of 3 per cent (as for future loss) will be applied when calculating the cost of additional accommodation, taking into account the fact that the property is likely to rise in value<sup>3</sup>.

A lump sum representing all such future loss will be arrived at by taking an appropriate multiplicand and applying a suitable multiplier on the basis of the estimated duration of the need<sup>4</sup>.

The plaintiff is entitled to recover the cost of any special equipment which he requires by reason of his injuries, and where new equipment, such as a car, will be required on a regular basis, the court must discount the purchase price with an appropriate resale value<sup>5</sup>.

1 *George v Pinnock* [1973] 1 All ER 926, [1973] 1 WLR 118, CA. The cost of special accommodation was denied in *Cunningham v Harrison* [1973] QB 942, [1973] 3 All ER 463, CA on the ground that need was not established. See also *Shearman v Folland* [1950] 2 KB 43, [1950] 1 All ER 976, CA where, as a result of the defendant's negligence, the plaintiff was obliged to live in a nursing home at a cost of 12 guineas per week, rather than the seven guineas per week she had previously been paying in a hotel. It was held that she was not entitled to recover the gross nursing home fees, only the difference between those fees and the hotel bills she would otherwise have incurred.

2 *George v Pinnock* [1973] 1 All ER 926, [1973] 1 WLR 118, CA; *Cunningham v Harrison* [1973] QB 942, [1973] 3 All ER 463, CA; *Moriarty v McCarthy* [1978] 2 All ER 213 at 220, [1978] 1 WLR 155 at 163 per O'Connor J; *Roberts v Johnstone* [1989] QB 878, [1989] LS Gaz 44, CA.

3 See *Roberts v Johnstone* [1989] QB 878, [1989] LS Gaz 44, CA; *Wells v Wells, Thomas v Brighton Health Authority, Page v Sheerness Steel Co plc* [1998] 3 All ER 481, [1998] 3 WLR 329, HL. The plaintiff's loss is the income which the capital would have earned over the period of the award after deduction of tax. However, this lost income is not to be calculated by reference to a normal commercial rate of interest. Interest normally includes two elements: a reward for taking a risk of loss or reduction of capital and a reward for forgoing the use of the money. Where the money is used to purchase a house, the plaintiff has lost only the second of these elements of interest. The appropriate rate of interest to be applied when calculating the cost of additional accommodation is 3% (the average net return on index-linked government securities).

4 As to the use of the multiplicand and the multiplier generally see PARA 881 ante.

5 *Woodrup v Nicol* [1993] PIQR Q104.

## **UPDATE**

### **895 Accommodation and equipment**

NOTE 3--As to the discount rate, see *Note (Ogden Tables)* (1999) Times, 3 May, and PARA 881 NOTE 11.

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### **C. MISCELLANEOUS EXAMPLES**

#### **896. Failed sterilisation.**

Where the defendant's negligent performance of a sterilisation operation results in the birth of a healthy child, public policy does not prevent the parents from recovering damages for the unwanted birth, even though the child may in fact be wanted by the time of its birth<sup>1</sup>.

Damages are recoverable for personal injuries during the period leading up to the delivery of the child, and for the economic loss involved in the expense of losing paid occupation and the obligation of having to pay for the upkeep and care of an unwanted child<sup>2</sup>. Damages may include loss of earnings for the mother, maintaining the child (taking into account child benefit)<sup>3</sup>, and pain and suffering to the mother<sup>4</sup>.

<sup>1</sup> See PARA 822 ante.

<sup>2</sup> *Allen v Bloomsbury Health Authority*[1993] 1 All ER 651, [1992] PIQR Q50.

<sup>3</sup> As to child benefit see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 237 et seq.

<sup>4</sup> *Emeh v Kensington and Chelsea and Westminster Area Health Authority*[1985] QB 1012, [1984] 3 All ER 1044, CA.

### **UPDATE**

#### **896 Failed sterilisation**

NOTES--As to damages recoverable where the defendant's negligent performance of a sterilisation operation results in the birth of a disabled child, see *Parkinson v St James and Seacroft University Hospital NHS Trust*[2001] EWCA Civ 530, [2001] 3 All ER 97, [2001] 3 WLR 376, applied in *Groom v Selby*[2001] EWCA Civ 1522, [2002] PIQR P201. See also *Kerry Roberts v Bro Taf Health Authority* [2002] Lloyd's Rep Med 182 (economic loss suffered as result of disabled child determined by needs of child and not parental means).

NOTE 2--Cf *McFarlane v Tayside Health Board*[1999] 4 All ER 961, HL (damages for economic loss for caring for healthy but unwanted child not recoverable). *Emeh*, cited, considered in *Rand v East Dorset Health Authority* (2000) 56 BMLR 39.

Healthy parents can not recover cost of bringing up healthy child following negligent sterilisation, but a sum may be awarded which, while not compensatory in nature, affords some measure of recognition of the wrong done: *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2003] 3 WLR 1091.

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### 897. Congenital abnormalities.

Where the defendant has negligently failed to warn the plaintiff parent of the risk that the child might be born with a congenital disability<sup>1</sup>, the costs associated with both the basic maintenance and the special needs of the child will be recoverable<sup>2</sup>. The mother who gives up paid employment to care for such a child is entitled to recover either her loss of earnings or the commercial rate for care of the child, but not both<sup>3</sup>. However where, following the birth of a child with a congenital disability, the parents have decided to forgo plans to have more children, the basic cost of maintenance will not be recoverable by reason of the saving made on the cost of bringing up the child who will not now be born<sup>4</sup>.

1 The child who suffers pre-natal injury as a result of the defendant's negligence has a cause of action against the defendant under the Congenital Disabilities (Civil Liability) Act 1976: see further TORT. However, a child born with a congenital disability has no cause of action in damages against a defendant against whom his only complaint is that he allowed him to be born with such a disability: *McKay v Essex Area Health Authority* [1982] QB 1166, [1982] 2 All ER 771, CA.

2 *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012, [1984] 3 All ER 1044, CA. This is subject to the normal requirement in a negligence action to prove causation; in such a case the plaintiff must show that, had she been warned of the risk, she would have had an abortion.

3 *Fish v Wilcox* [1994] 5 Med LR 230, CA.

4 *Salih v Enfield Health Authority* [1991] 3 All ER 400, [1991] 2 Med LR 235, CA.

### UPDATE

### 897 Congenital abnormalities

NOTES--As to damages recoverable for a disabled child born after a negligent sterilisation operation where the parent was warned that the child might be born with a disability, see *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2001] 3 All ER 97, [2001] 3 WLR 376, applied in *Groom v Selby* [2001] EWCA Civ 1522, [2002] PIQR P201. See also *Kerry Roberts v Bro Taf Health Authority* [2002] Lloyd's Rep Med 182 (economic loss suffered as result of disabled child determined by needs of child and not parental means).

NOTE 2--See *Nunnerley v Warrington Health Authority* (1999) Times, 26 November (costs of caring for disabled child after the age of 18 who would not have been conceived but for negligent advice recoverable).

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### **898. Gratuitous services.**

Where the injured plaintiff is cared for, not by professional, paid carers, but by volunteers, whether members of his family or otherwise, the award of damages will reflect the value of the services provided<sup>1</sup>. The value of such gratuitous services may be determined either by applying the cost of buying such care on the open market<sup>2</sup>, by assessing the loss of income suffered by a carer who has given up paid employment to care for the plaintiff<sup>3</sup>, or a combination of the two<sup>4</sup>. A plaintiff who receives damages for services rendered by another holds the relevant amount on trust for that other<sup>5</sup>.

Where the gratuitous care is rendered by the tortfeasor, no award will be made in respect of the value of this care on the ground that this would amount to double compensation<sup>6</sup>.

1 See *Roach v Yates* [1938] 1 KB 256 (the carers were the plaintiff's wife and sister-in-law); *Cunningham v Harrison* [1973] QB 942, [1973] 3 All ER 463, CA (care was provided by the plaintiff's wife); *Donnelly v Joyce* [1974] QB 454, [1973] 3 All ER 475, CA (care provided by plaintiff's mother); *Housecroft v Burnett* [1986] 1 All ER 332, CA (care provided by the plaintiff's mother).

2 In *Taylor v Glass* [1979] CLY 672, the full commercial rate was paid.

3 *Housecroft v Burnett* [1986] 1 All ER 332 at 343, CA, per O'Connor LJ.

4 A common practice now is to award gratuitous family care at two-thirds of the market rate: *McDaid v Howlett's and Port Lympne Estates Ltd* (17 May 1996, unreported), QBD.

5 *Hunt v Severs* [1994] 2 AC 350, [1994] 2 All ER 385, HL; upholding *Cunningham v Harrison* [1973] QB 942, [1973] 3 All ER 463, CA; and doubting *Donnelly v Joyce* [1974] QB 454, [1973] 3 All ER 475, CA; and *Housecroft v Burnett* [1986] 1 All ER 332, CA.

6 *Hunt v Severs* [1994] 2 AC 350, [1994] 2 All ER 385, HL.

### **UPDATE**

### **898 Gratuitous services**

TEXT AND NOTES--No award can be made in respect of voluntary services provided for the benefit of the injured party's business, as opposed to his personal care, unless the provider of those services is fulfilling an express or implied contractual obligation: *Hardwick v Hudson* [1999] 3 All ER 426, CA.

NOTES--See *Martin and Brown v Grey* (13 May 1998, unreported), DC.

NOTE 1--See *Giambrone v JMC Holidays Ltd (formerly Sunworld Holidays Ltd)* [2004] EWCA Civ 158, [2004] PIQR Q38.

NOTE 5--A person who provides gratuitous care for a disabled family member is entitled to recover damages for personal injury that reduces his capacity to provide such care: *Lowe v Guise* [2002] EWCA Civ 197, [2002] 3 All ER 454, [2002] 3 WLR 562.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(ii) Heads of Damage/C. MISCELLANEOUS EXAMPLES/899. Loss of parental care.

**899. Loss of parental care.**

A child whose mother is seriously injured in an accident, and who is thereby deprived of her care and other maternal services, does not have a cause of action in respect of the value of this loss: the action in such a case belongs to the mother, and, as such is subject to the normal deductions for contributory negligence where applicable<sup>1</sup>.

<sup>1</sup> *Buckley v Farrow and Buckley* (4 February 1997, unreported), CA.



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### **(iii) Deductions**

#### **A. IN GENERAL**

##### **900. Deductions in general.**

An award of damages is intended to be compensatory<sup>1</sup>, and therefore the plaintiff should recover only the net amount of his losses arising from the injury<sup>2</sup> and should give credit for any payments which he receives as a result of that injury. All receipts due to an accident must be set against losses claimed to have arisen because of the accident. To that end, a sum representing the tax payable will be deducted from an award for loss of earnings<sup>3</sup>. However, certain sums recoverable as a result of the injury will be disregarded: these are benevolent gifts<sup>4</sup> and moneys received as a result of insurance policies<sup>5</sup>.

1 *Livingstone v Rawyards Coal Co*(1880) 5 App Cas 25 at 39, HL, per Lord Blackburn.

2 In *Parry v Cleaver*[1970] AC 1, [1969] 1 All ER 555, HL, the question asked was what are the sums which would have been received but for the accident, but which by reason of the accident can no longer be obtained? See also *Hodgson v Trapp*[1989] AC 807, [1988] 3 All ER 870, HL.

3 *British Transport Commission v Gourley*[1956] AC 185, [1955] 3 All ER 796, HL; *Parry v Cleaver*[1970] AC 1, [1969] 1 All ER 555, HL. See PARAS 885 ante, 901 post.

4 *Liffen v Watson*[1940] 1 KB 556, [1940] 2 All ER 213, CA; *Redpath v Belfast and County Down Rly*[1947] NI 167.

5 *Parry v Cleaver*[1970] AC 1, [1969] 1 All ER 555, HL.

#### **UPDATE**

##### **900 Deductions in general**

NOTE 4--Benevolent gifts made by the wrongdoer himself cannot be disregarded: *Williams v BOC Gases Ltd*(2000) Times, 5 April, CA. See also *Sklair v Haycock* [2009] EWHC 3328 (QB), [2009] All ER (D) 159 (Dec).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(iii) Deductions/A. IN GENERAL/901. Taxation and other deductions from salary.

### 901. Taxation and other deductions from salary.

Any tax which the plaintiff would have paid on the lost earnings awarded as damages must be deducted<sup>1</sup>. If the damages when awarded would be subject to any form of tax, this rule will not apply and the damages will not be reduced<sup>2</sup>. Where both the loss and the damages are taxable, no reduction is applied on either side<sup>3</sup>. Where damages are in part exempt from tax and in part not, the rule will be applied to the untaxed portion<sup>4</sup>.

Where, as a result of not working, the plaintiff is entitled to a rebate of income tax previously paid, this is a direct consequence of the accident and an award of damages will be reduced by the amount of the rebate<sup>5</sup>. Similarly, where, following a period of not working, the plaintiff returns to work but is not immediately subject to taxation by reason of the period when he was not earning, this will represent a compensatory gain for which credit must be given in the assessment of damages for loss of earnings<sup>6</sup>.

Where the plaintiff's claim is for a part, rather than the totality of his earnings, the part for which compensation is assessed will be deemed to be the top portion of his earnings, the portion on which the highest rate of tax is paid<sup>7</sup>. The court must make the best commonsense estimate it can of future rates of taxes and allowances<sup>8</sup>. It may take account of possible changes in way of life (such as marriage) affecting tax, and the fact that the plaintiff might adopt legitimate means of reducing the burden of tax<sup>9</sup>. An award of damages will similarly be reduced to take into account any other deductions normally made from the plaintiff's earnings. These include National Insurance contributions<sup>10</sup> and pension payments<sup>11</sup>.

1 *British Transport Commission v Gourley* [1956] AC 185, [1955] 3 All ER 796, HL. Where the plaintiff is subject to overseas tax on his earnings, the amount of any such tax must be proved by expert evidence: *Phipps v Orthodox Unit Trusts Ltd* [1958] 1 QB 314, [1957] 3 All ER 305, CA.

2 *Julien Praet et Cie, S/A v HG Poland Ltd* [1962] 1 Lloyd's Rep 566; approved in *Parsons v BNM Laboratories Ltd* [1964] 1 QB 95, [1963] 2 All ER 658, CA.

3 *Parsons v BNM Laboratories Ltd* [1964] 1 QB 95 at 130, [1963] 2 All ER 658 at 675, CA, per Harman LJ.

4 *Parsons v BNM Laboratories Ltd* [1964] 1 QB 95, [1963] 2 All ER 658, CA; *Bold v Brough, Nicholson and Hall* [1963] 3 All ER 849, [1964] 1 WLR 201; *Shove v Downs Surgical plc* [1984] ICR 532, [1984] 1 All ER 7; *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, CA; *Denny v Gooda Walker Ltd (in liquidation)* [1995] 4 All ER 289, [1995] 1 WLR 1206; cf *John v James* [1986] STC 352.

5 *Hartley v Sandholme Iron Co Ltd* [1975] QB 600, [1974] 3 All ER 745.

6 *Brayson v Wilmot-Breedon* [1976] CLY 682.

7 *Lyndale Fashion Manufacturers v Rich* [1973] 1 All ER 33 at 37, [1973] 1 WLR 73 at 79, CA, per Orr LJ; but see *Houghton v Main Colliery Co* [1956] 3 All ER 300, [1956] 1 WLR 1219 (middle slice, but not overruled); *Bold v Brough Nicholson and Hall* [1963] 3 All ER 849, [1964] 1 WLR 201 (bottom slice, but lost payment exempt from tax).

8 *British Transport Commission v Gourley* [1956] AC 185, [1985] 3 All ER 796, HL.

9 *Beach v Reed Corrugated Cases* [1956] 2 All ER 652, [1956] 1 WLR 807.

10 *Cooper v Firth Brown Ltd* [1963] 2 All ER 31, [1963] 1 WLR 418; *Dews v National Coal Board* [1988] AC 1, [1987] 2 All ER 545, HL.

11 *Dews v National Coal Board* [1988] AC 1, [1987] 2 All ER 545, HL. The plaintiff is, however, entitled to compensation for any loss of pension rights resulting from the injury: see PARA 892 ante.

## **UPDATE**

### **901 Taxation and other deductions from salary**

NOTE 1--See *Amstrad plc v Seagate Technology Inc* (1997) 86 BLR 34.

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## **902. Insurance and pensions.**

Any payments which the plaintiff receives by reason of the accident from an insurance policy to which he has contributed do not fall to be set off against the losses arising from the accident<sup>1</sup>.

A disability pension, whether contributory or non-contributory, falls outside the normal rule that prima facie receipts due to an accident must be set off against losses claimed to have arisen because of the accident<sup>2</sup>. However, incapacity and disability pension payments in respect of the period after the normal retirement age must be brought into account in computing the claim for loss of pension after that age since the claim at that stage is for loss of pension and account must therefore be taken of receipts of the same character arising in the same period<sup>3</sup>.

Where the plaintiff is in receipt of a lump sum on retirement on the grounds of incapacity, he is required to apportion the lump sum between the periods before and after his normal retirement age and to set against his claim for the loss of retirement pension the portion of this lump sum attributable to the period after his normal retirement age<sup>4</sup>.

1 *Bradburn v Great Western Rly Co* (1874) LR 10 Exch 1; *Parry v Cleaver* [1970] AC 1, [1969] 1 All ER 555, HL; *Smoker v London Fire and Civil Defence Authority*, *Wood v British Coal Corpn* [1991] 2 AC 502, [1991] 2 All ER 449, HL; *Hodgson v Trapp* [1989] AC 807, [1988] 3 All ER 870, HL; *Hussain v New Taplow Paper Mills Ltd* [1988] AC 514, [1988] 1 All ER 541 HL.

2 *Parry v Cleaver* [1970] AC 1, [1969] 1 All ER 555, HL; approving *Payne v Railway Executive* [1952] 1 KB 26, [1951] 2 All ER 910, CA. See also *Smoker v London Fire and Civil Defence Authority*, *Wood v British Coal Corpn* [1991] 2 AC 502, [1991] 2 All ER 449, HL.

3 *Longden v British Coal Corpn* [1997] 3 WLR 1336, [1998] 1 CL 155, HL.

4 *Longden v British Coal Corpn* [1997] 3 WLR 1336, [1998] 1 CL 155, HL.

## **UPDATE**

## **902 Insurance and pensions**

NOTE 1--As to set off of a defendant employer's group accident insurance policy payments, see *Gaca v Pirelli General plc* [2004] EWCA Civ 373, [2004] 3 All ER 348, [2004] 1 WLR 2683; PARA 886.

NOTES 2-4--See *Cantwell v Criminal Injuries Compensation Board* 2001 SLT 966, HL (calculating claim for loss of pension).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(iii) Deductions/B. RECOVERY OF SOCIAL SECURITY BENEFITS/(A) In General/903. Introduction.

## **B. RECOVERY OF SOCIAL SECURITY BENEFITS**

### **(A) IN GENERAL**

#### **903. Introduction.**

Where the injured plaintiff is in receipt of benefits payable as a result of the injury, these may, in certain circumstances, be repayable in order to avoid double compensation<sup>1</sup>. There is no lower limit of compensation against which recovery will not be effected<sup>2</sup>. There are a number of payments which are not subject to recoupment, particularly damages awarded for pain and suffering, loss of amenity, medical expenses, future loss of earnings, future costs of care and mobility<sup>3</sup>.

Where a plaintiff has received benefits from a foreign state, and is required by law to repay those benefits in the event that he receives damages for his injuries, no deduction will be made by the courts from his award of damages<sup>4</sup>.

In assessing damages in respect of any accident, injury or disease, the amount of any listed benefits<sup>5</sup> paid or likely to be paid is to be disregarded<sup>6</sup>.

<sup>1</sup> See generally the Social Security (Recovery of Benefits) Act 1997; the Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205; the Social Security (Recovery of Benefits) (Appeals) Regulations 1997, SI 1997/2237; and PARAS 878, 855 ante and PARA 904 et seq post. The new scheme became operational on 6 October 1997 and applies to all compensation payments made in cases not settled at this date, including pre-1989 cases which were not subject to the previous scheme contained in the Social Security Administration Act 1992 Pt IV (repealed) and the Social Security (Recoupment) Regulations 1990, SI 1990/322 (revoked). For transitional provisions see the Social Security (Recovery of Benefits) Act 1997 s 32; the Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 12. As to provisions relating to Northern Ireland see the Social Security (Recovery of Benefits) Act 1997 ss 25-27; and as to financial arrangements in relation to expenses and receipts of the Secretary of State under the scheme see s 31.

The Social Security (Recovery of Benefits) Act 1997 binds the Crown: s 28.

Any power under the Social Security (Recovery of Benefits) Act 1997 to make regulations or an order is exercisable by statutory instrument: s 30(1). A statutory instrument containing regulations or an order under that Act (other than regulations under s 24 or an order under s 34 (commencement)) is subject to annulment in pursuance of a resolution of either House of Parliament: s 30(2). Regulations under s 20 (overpayment: see PARA 917 post), under s 24 amending the list of benefits in s 8(1), Sch 2 col 2 (see PARAS 904, 919 post) or under s 1(2), Sch 1 Pt II para 9 (see PARA 904 post) may not be made without the consent of the Treasury: s 30(3). The Social Security Administration Act 1992 s 189(4), (5), (6), (9) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 30) applies for the purposes of the 1997 Act as applies for the purposes of that 1992 Act: Social Security (Recovery of Benefits) Act 1997 s 30(4).

<sup>2</sup> Under the 1989 scheme there was a small payments exception of £2,500.

<sup>3</sup> See PARA 882 et seq ante.

<sup>4</sup> *Berriello v Felixstowe Dock and Rly Co* [1989] 1 WLR 695, [1989] ICR 467, CA.

<sup>5</sup> For the meaning of 'listed benefits' see PARA 904 note 2 post.

<sup>6</sup> Social Security (Recovery of Benefits) Act 1997 s 17.

#### **UPDATE**

### 903 Introduction

NOTE 1--SI 1997/2237 replaced by Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991: see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 356A.13.

See *Black v Doncaster MBC*[1998] 3 All ER 631, CA; *Rand v East Dorset Health Authority*(2000) Times, 10 May.

NOTE 3--See *Freeman v Lockett*[2006] EWHC 102 (QB), [2006] PIQR P340 (no deduction made for future domiciliary care payments from local authority as no guarantee such payments would continue). See also *Crofton v National Health Service Litigation Authority* [2007] EWCA Civ 71, [2007] 1 WLR 923 (whole-life multiplier applied to direct payments made by local authority for individual's care needs must be discounted).

NOTE 6--See *McKenna v Chief Constable, Strathclyde Police* 1998 SLT 1161, OH. The amount of any listed benefits paid is also to be disregarded when calculating the amount of interest due on an award of special damages: *Wisley v John Fulton (Plumbers) Ltd*; *Wadey v Surrey CC*[2000] 2 All ER 545, [2000] 1 WLR 820, HL.

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#### **904. Application of the Social Security (Recovery of Benefits) Act 1997.**

The Social Security (Recovery of Benefits) Act 1997 applies in cases where:

- 12 (1) a person makes a payment<sup>1</sup> (whether on his own behalf or not) to or in respect of any other person in consequence of any accident, injury or disease suffered by the other; and
- 13 (2) any listed benefits<sup>2</sup> have been, or are likely to be, paid to or for the other during the relevant period<sup>3</sup> in respect of the accident, injury or disease<sup>4</sup>.

The reference above to a payment in consequence of any accident, injury or disease is to a payment made:

- 14 (a) by or on behalf of a person who is, or is alleged to be, liable to any extent in respect of the accident, injury or disease; or
- 15 (b) in pursuance of a compensation scheme for motor accidents<sup>5</sup>;

but does not include an exempted<sup>6</sup> payment<sup>7</sup>.

Head (1) above applies to a payment made voluntarily, or in pursuance of a court order or an agreement, or otherwise, and made in the United Kingdom<sup>8</sup> or elsewhere<sup>9</sup>.

The Social Security (Recovery of Benefits) Act 1997 applies in relation to compensation payments made on or after 6 October 1997<sup>10</sup>, unless they are made in pursuance of a court order or agreement made before that day<sup>11</sup>. In a case where the 1997 Act applies, the 'injured person' is the person who suffered the accident, injury or disease, the 'compensation payment' is the payment within head (1) above, and 'recoverable benefit' is any listed benefit which has been or is likely to be paid as mentioned in head (2) above<sup>12</sup>.

1 For these purposes, 'payment' means payment in money or money's worth, and related expressions are to be interpreted accordingly: Social Security (Recovery of Benefits) Act 1997 s 29.

2 'Listed benefit' means a benefit listed in *ibid* s 8(1), Sch 2 col 2. Those benefits are: (1) disability working allowance; (2) disablement pension payable under the Social Security Contributions and Benefits Act 1992 s 103 (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARAS 141-142); (3) incapacity benefit; (4) income support; (5) invalidity pension and allowance; (6) jobseeker's allowance; (7) reduced earnings allowance; (8) severe disablement allowance; (9) sickness benefit; (10) statutory sick pay; (11) unemployability supplement; (12) unemployment benefit; (13) attendance allowance; (14) care component of disability living allowance; (15) disablement pension increase payable under s 104 or s 105 (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARAS 147, 149); (16) mobility allowance; (17) mobility allowance component of disability living allowance: Social Security (Recovery of Benefits) Act 1997 Sch 2 col 2. As to these various benefits see generally SOCIAL SECURITY AND PENSIONS.

The Secretary of State may by regulations amend Sch 2: s 24(1). A statutory instrument which contains such regulations may not be made unless a draft of the instrument has been laid before and approved by resolution of each House of Parliament: s 24(2). At the date at which this volume states the law, no such regulations had been made.

3 In relation to a person ('the claimant') who has suffered any accident, injury or disease, 'the relevant period' has the meaning given by the following provisions: *ibid* s 3(1). Subject to s 3(4), if it is a case of accident or injury, the relevant period is the period of five years immediately following the day on which the accident or injury in question occurred; while if it is a case of disease, the relevant period is the period of five years

beginning with the date on which the claimant first claims a listed benefit in consequence of the disease: see s 3(2), (3). If at any time before the end of the period referred to in s 3(2) or (3), a person makes a compensation payment in final discharge of any claim made by or in respect of the claimant and arising out of the accident, injury or disease, or an agreement is made under which an earlier compensation payment is treated as having been made in final discharge of any such claim, the relevant period ends at that time: s 3(4).

4 Ibid s 1(1).

5 For these purposes, 'compensation scheme for motor accidents' means any scheme or arrangement under which funds are available for the payment of compensation in respect of motor accidents caused, or alleged to have been caused, by uninsured or unidentified persons: ibid s 29.

6 I.e. a payment mentioned in ibid s 1(2), Sch 1 Pt I. Those payments are: (1) any small payment, as defined in Sch 1 Pt II; (2) any payment made to or for the injured person under the Powers of Criminal Courts Act 1973 s 35 (compensation orders against convicted persons); (3) any payment made in the exercise of a discretion out of property held subject to a trust in a case where no more than 50% by value of the capital contributed to the trust was directly or indirectly provided by persons who are, or are alleged to be, liable in respect of (a) the accident, injury or disease suffered by the injured person; or (b) the same or any connected accident, injury or disease suffered by another; (4) any payment made out of property held for the purposes of any prescribed trust (whether the payment also falls within head (3) supra or not); (5) any payment made to the injured person by an insurance company within the meaning of the Insurance Companies Act 1982 under the terms of any contract of insurance entered into between the injured person and the company before (a) the date on which the injured person first claims a listed benefit in consequence of the disease in question; or (b) the occurrence of the accident or injury in question; (6) any redundancy payment falling to be taken into account in the assessment of damages in respect of an accident, injury or disease; (7) so much of any payment as is referable to costs; and (8) any prescribed payment: Social Security (Recovery of Benefits) Act 1997 Sch 1 Pt I paras 1-8. 'Prescribed' means prescribed by regulations; and 'regulations' means regulations made by the Secretary of State: s 29. The following trusts are prescribed for the purposes of head (4) supra: (i) the Macfarlane Trust established on 10 March 1988 partly out of funds provided by the Secretary of State to the Haemophilia Society for the relief of poverty or distress among those suffering from haemophilia; (ii) the Macfarlane (Special Payments) Trust established on 29 January 1990 partly out of funds provided by the Secretary of State, for the benefit of certain persons suffering from haemophilia; (iii) the Macfarlane (Special Payments) (No 2) Trust established on 3 May 1991 partly out of funds provided by the Secretary of State for the benefit of certain persons suffering from haemophilia and other beneficiaries; (4) the Eileen Trust established on 29 March 1993 out of funds provided by the Secretary of State for the benefit of persons eligible for payment in accordance with its provisions: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 2(1).

The following payments are prescribed for the purposes of head (8) supra: (A) any payment to the extent that is made in consequence of an action under the Fatal Accidents Act 1976 (see PARA 932 et seq post) or in circumstances where, had an action been brought, it would have been brought under that Act; (B) any payment to the extent that it is made in respect of a liability arising by virtue of the Damages (Scotland) Act 1976 s 1; (C) any payment made under the Vaccine Damage Payments Act 1979 to or in respect of the injured person; (D) any award of compensation made to or in respect of the injured person under the Criminal Injuries Compensation Act 1995 or by the Criminal Injuries Compensation Board under the Criminal Injuries Compensation Scheme 1990 or any earlier scheme; (E) any compensation payment made by British Coal in accordance with the NCB Pneumoconiosis Compensation Scheme set out in the Schedule to an agreement made on 13 September 1974 between the National Coal Board, the National Union of Mine Workers, the National Association of Colliery Overmen Deputies and Shot-firers and the British Association of Colliery Management; (F) any payment made to the injured person in respect of sensorineural hearing loss where the loss is less than 50 dB in one or both ears; (G) any contractual amount paid to an employee by an employer of his in respect of a period of incapacity for work; (H) any payment made under the National Health Service (Injury Benefits) Regulations 1995, SI 1995/866 (as amended) (see HEALTH SERVICES vol 54 (2008) PARA 744); (I) any payment made by or on behalf of the Secretary of State for the benefit of persons eligible for payment in accordance with the provisions of a scheme established by him on 24 April 1992: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 2(2).

Regulations may make provision for compensation payments to be disregarded for the purposes of the Social Security (Recovery of Benefits) Act 1997 ss 6, 8 (see PARA 919 post) in prescribed cases where the amount of the compensation payment, or the aggregate amount of two or more connected compensation payments, does not exceed the prescribed sum; and a compensation payment disregarded by virtue of this provision is referred to in head (1) supra as a 'small payment': Sch 1 Pt II para 9(1), (2). For these purposes, two or more compensation payments are 'connected' if each is made to or in respect of the same injured person and in respect of the same accident, injury or disease, and any reference to a compensation payment is a reference to a payment which would be such a payment apart from head (1) supra: Sch 1 Pt II para 9(3).

7 Ibid s 1(2).

8 For the meaning of 'United Kingdom' see PARA 843 note 3 ante.



9 Social Security (Recovery of Benefits) Act 1997 s 1(3).

10 le the date when the whole of the Social Security (Recovery of Benefits) Act 1997 came into force to the extent that it was not already in force: see the Social Security (Recovery of Benefits) Act 1997 (Commencement) Order 1997, SI 1997/2085, art 2(2).

11 Social Security (Recovery of Benefits) Act 1997 s 2; and see *Black v Doncaster Metropolitan Borough Council* [1998] 3 All ER 631, CA. As to payments into court see, with effect from 28 September 1998, CCR Ord 11 r 1(1A).

12 Social Security (Recovery of Benefits) Act 1997 s 1(4).

## UPDATE

### 904 Application of the Social Security (Recovery of Benefits) Act 1997

TEXT AND NOTES--The Secretary of State has the power to make regulations providing for the recovery of lump sum payments made under the Pneumoconiosis etc (Workers' Compensation) Act 1979, the Child Maintenance and Other Payments Act 2008 Pt 4 (ss 46-54) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 172A), or those made on an extra-statutory basis following the rejection by the Secretary of State of a claim under the Pneumoconiosis etc (Workers' Compensation) Act 1979: see the Social Security (Recovery of Benefits) Act 1997 s 1A (added by the Child Maintenance and Other Payments Act 2008 s 54). As to such regulations, see the Social Security (Recovery of Benefits) (Lump Sum Payments) Regulations 2008, SI 2008/1596 (amended by SI 2008/2365, SI 2008/2683, SI 2009/1494). As to the modification of the Social Security (Recovery of Benefits) Act 1997 ss 1, 11-15, 17-23, 26, 27, 29, and Sch 1 for the purposes of SI 2008/1596, see reg 2, Sch 1 (Sch 1 amended by SI 2008/2683).

NOTE 2--Head (1) omitted: Social Security (Recovery of Benefits) Act 1997 Sch 2 col 2 (amended by Tax Credits Act 1999 Sch 2 para 18(1)(a), (2), Sch 6). Also, head (18) employment and support allowance: 1997 Act Sch 2 col 2 (amended by SI 2008/1554).

NOTE 6--In head (2) also any payment made under the Armed Forces Act 2006 s 175 (see ARMED FORCES vol 2(2) (Reissue) PARA 424A.2): 1997 Act Sch 1 para 2 (amended by the Armed Forces Act 2006 Sch 16 para 140). In head (5) for 'insurance company within the meaning of the Insurance Companies Act 1982' read 'insurer' and for 'the company' read 'the insurer': 1997 Act Sch 1 para 5(1) (amended by SI 2001/3649). For the meaning of 'insurer' for these purposes see 1997 Act Sch 1 para 5(2) (added by SI 2001/3649).

Head (4) (re the Eileen Trust) should be numbered as head (iv). In addition, heads (v) a trust established out of funds provided by the Secretary of State in respect of persons who suffered, or who are suffering, from variant Creutzfeldt-Jakob disease for the benefit of persons eligible for interim payments in accordance with its provisions; (vi) a trust established out of funds provided by the Secretary of State in respect of persons who suffered, or who are suffering, from variant Creutzfeldt-Jakob disease for the benefit of persons eligible for payments, other than interim payments, in accordance with its provisions; (vii) the UK Asbestos Trust established on 10 October 2006, for the benefit of certain persons suffering from asbestos-related diseases; and (viii) the EL Scheme Trust established on 23 November 2006, for the benefit of certain persons suffering from asbestos-related diseases: SI 1997/2205 reg 2(1) (amended by SI 2001/1118, SI 2007/357).

Also, heads (j) any payment made from the Skipton Fund, the ex gratia payment scheme administered by the Skipton Fund Ltd, incorporated on 25 March 2004, for the benefit of certain persons suffering from hepatitis C and other persons eligible for payment in accordance with the scheme's provisions; (k) any payment made from the

London Bombings Relief Charitable Fund, the company limited by guarantee and registered charity of that name established on 11 July 2005 for the purpose of (among other things) relieving sickness, disability or financial need of victims (including families or dependants of victims) of the terrorist attacks carried out in London on 7 July 2005: SI 1997/2205 reg 2(2) (amended by SI 2004/1141, SI 2005/3391).

NOTE 11--CCR replaced by the Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

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### **905. Provision of information.**

Where compensation is sought in respect of any accident, injury or disease suffered by any person ('the injured person'), the following persons must give the Secretary of State the prescribed information<sup>1</sup> about the injured person:

- 16 (1) anyone who is, or is alleged to be, liable in respect of the accident, injury or disease; and
- 17 (2) anyone acting on behalf of such a person<sup>2</sup>.

A person who receives or claims a listed benefit<sup>3</sup> which is or is likely to be paid in respect of an accident, injury or disease suffered by him, must give the Secretary of State the prescribed information<sup>4</sup> about the accident, injury or disease<sup>5</sup>; and where a person who has received a listed benefit dies, this duty is imposed on his personal representative<sup>6</sup>.

Any person who makes a payment<sup>7</sup>, whether on his own behalf or not, in consequence of, or which is referable to any costs incurred by reason of, any accident, injury or disease, or any damage to property, must, if the Secretary of State requests him in writing to do so, give the Secretary of State such particulars relating to the size and composition of the payment as are specified in the request<sup>8</sup>.

The employer<sup>9</sup> of a person who suffers or has suffered an accident, injury or disease, and anyone who has been the employer of such a person at any time during the relevant period, must give the Secretary of State the prescribed information<sup>10</sup> about the payment of statutory sick pay in respect of that person<sup>11</sup>.

A person who is required to give information under these provisions must do so in the prescribed manner, at the prescribed place and within the prescribed time<sup>12</sup>. The compensator must do so by sending it to the Compensation Recovery Unit<sup>13</sup> not later than 14 days after the date on which he receives a claim for compensation from the injured person in respect of the accident, injury or disease<sup>14</sup>; and the injured person or employer must do so by sending it to that unit not later than 14 days after the date on which the Secretary of State requests the information from him<sup>15</sup>.

1 The following information is prescribed for this purpose: (1) the full name and address of the injured person; (2) where known, the date of birth or national insurance number of that person, or both if both are known; (3) where the liability arises, or is alleged to arise, in respect of an accident or injury, the date of the accident or injury; (4) the nature of the accident, injury or disease; and (5) where known, and where the relevant period may include a period prior to 6 April 1994, whether, at the time of the accident or injury or diagnosis of the disease, the person was employed under a contract of service, and, if he was, the name and address of his employer at that time and the person's payroll number: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 3. For the meaning of 'the relevant period' see PARA 904 note 3 ante. For the meaning of 'prescribed' see PARA 904 note 6 ante.

2 Social Security (Recovery of Benefits) Act 1997 s 23(1). Section 1 (see PARA 904 ante) does not apply in relation to s 23: s 23(8).

3 For the meaning of 'listed benefit' see PARA 904 note 2 ante.

4 The following information is prescribed for this purpose: (1) whether the accident, injury or disease resulted from any action taken by another person, or from any failure of another person to act, and, if so, the full name and address of that other person; (2) whether the injured person has claimed or may claim a

compensation payment, and, if so, the full name and address of the person against whom the claim was or may be made; (3) the amount of any compensation payment and the date on which it was made; (4) the listed benefits claimed, and for each benefit the date from which it was first claimed and the amount received in the period beginning with that date and ending with the date the information is sent; (5) in the case of a person who has received statutory sick pay during the relevant period and prior to 6 April 1994, the name and address of any employer who made those payments to him during the relevant period and the dates the employment with that employer began and ended; and (6) any changes in the medical diagnosis relating to the condition arising from the accident, injury or disease: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 4. As to statutory sick pay see EMPLOYMENT vol 39 (2009) PARA 498 et seq. For the meaning of 'compensation payment' see PARA 904 note 1 ante.

5 Social Security (Recovery of Benefits) Act 1997 s 23(2).

6 Ibid s 23(3).

7 For the meaning of 'payment' see PARA 904 note 1 ante.

8 Social Security (Recovery of Benefits) Act 1997 s 23(4).

9 For these purposes, 'employer' has the same meaning as it has in the Social Security Contributions and Benefits Act 1992 Pt XI (ss 151-163) (as amended) (statutory sick pay): Social Security (Recovery of Benefits) Act 1997 s 23(6).

10 The following information is prescribed for this purpose: (1) the amount of any statutory sick pay the employer has paid to the injured person since the first day of the relevant period and before 6 April 1994; (2) the date the liability to pay such statutory sick pay first arose and the rate at which it was payable; (3) the date on which such liability terminated; and (4) the causes of incapacity for work during any period of entitlement to statutory sick pay during the relevant period and prior to 6 April 1994: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 5.

11 Social Security (Recovery of Benefits) Act 1997 s 23(5).

12 Ibid s 23(7).

13 'Compensation Recovery Unit' means the Compensation Recovery Unit of the Department of Social Security at Reyrolle Building, Hebburn, Tyne and Wear NE31 1XB: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 1(2).

14 See ibid reg 6(a).

15 See ibid reg 6(b).

## **UPDATE**

### **905 Provision of information**

NOTE 13--Compensation Recovery Unit is now at Durham House, Washington, Tyne & Wear, NE38 7SF: SI 1997/2205 reg 1(2) (amended by SI 2000/3030).

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## (B) CERTIFICATES OF RECOVERABLE BENEFITS

### *(a) In general*

#### **906. Applications for certificates of recoverable benefits.**

Before the compensator makes a compensation payment<sup>1</sup> he must apply to the Secretary of State for a certificate of recoverable benefits<sup>2</sup>. Where the compensator applies for a certificate of recoverable benefits, the Secretary of State must send to him a written acknowledgement of receipt<sup>3</sup> of his application, and issue the certificate before the end of the following period<sup>4</sup>. The period is the prescribed<sup>5</sup> period or, if there is no prescribed period, the period of four weeks, which begins with the day following the day on which the application is received<sup>6</sup>. The certificate is to remain in force until the date specified in it for that purpose<sup>7</sup>.

The compensator may apply for fresh certificates from time to time<sup>8</sup>.

Where a certificate of recoverable benefits ceases to be in force, the Secretary of State may issue a fresh certificate without an application for one being made<sup>9</sup>.

Where the compensator applies for a fresh certificate while the existing certificate remains in force, the Secretary of State must issue the fresh certificate before the end of the following period<sup>10</sup>. The period is the prescribed period, or if there is no prescribed period, the period of four weeks, which begins with the day following the day on which the existing certificate ceases to be in force<sup>11</sup>.

1 For the meaning of 'compensation payment' see PARA 904 note 1 ante.

2 Social Security (Recovery of Benefits) Act 1997 s 4(1). For the meaning of 'recoverable benefit' see PARA 904 note 2 ante.

3 Regulations may provide for the day on which an application for a certificate of recoverable benefits is to be treated as received for these purposes: *ibid* s 4(9). For the meaning of 'regulations' see PARA 904 note 6 ante.

4 *Ibid* s 4(2). As to the use of computers to issue certificates see the Social Security Act 1998 s 2 (not yet in force at the date at which this volume states the law).

5 For the meaning of 'prescribed' see PARA 904 note 6 ante.

6 Social Security (Recovery of Benefits) Act 1997 s 4(3).

7 *Ibid* s 4(4).

8 *Ibid* s 4(5).

9 *Ibid* s 4(6).

10 *Ibid* s 4(7).

11 *Ibid* s 4(8).

#### **UPDATE**

**906 Application for certificates of recoverable benefits**

TEXT AND NOTES--Repealed: SI 2008/2833.

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### **907. Information contained in certificates.**

A certificate of recoverable benefits<sup>1</sup> must specify, for each recoverable benefit:

- 18 (1) the amount which has been or is likely to have been paid on or before a specified date; and
- 19 (2) if the benefit<sup>2</sup> is paid or likely to be paid after the specified date, the rate and period for which, and the intervals at which, it is or is likely to be so paid<sup>3</sup>.

In a case where the relevant period<sup>4</sup> has ended before the day on which the Secretary of State receives the application for the certificate, the date specified in the certificate for these purposes must be the day on which the relevant period ended<sup>5</sup> and, in any other case, must not be earlier than the day on which the Secretary of State received the application<sup>6</sup>.

The Secretary of State may estimate, in such manner as he thinks fit, any of the amounts, rates or periods specified in the certificate<sup>7</sup>.

Where the Secretary of State issues a certificate of recoverable benefits, he must provide the information contained in the certificate to:

- 20 (a) the person who appears to him to be the injured person<sup>8</sup>; or
- 21 (b) any person who he thinks will receive a compensation payment<sup>9</sup> in respect of the injured person<sup>10</sup>.

A person to whom a certificate of recoverable benefits is issued or who is provided with information under this provision is entitled to particulars of the manner in which any amount, rate or period specified in the certificate has been determined, if he applies to the Secretary of State for those particulars<sup>11</sup>.

1 As to such certificates see PARA 906 ante.

2 'Benefit' means any benefit under the Social Security Contributions and Benefits Act 1992, a jobseeker's allowance or mobility allowance: Social Security (Recovery of Benefits) Act 1997 s 29.

3 Ibid s 5(1).

4 For the meaning of 'the relevant period' see PARA 904 note 3 ante.

5 Social Security (Recovery of Benefits) Act 1997 s 5(2).

6 See ibid s 5(3).

7 Ibid s 5(4).

8 For the meaning of 'injured person' see PARA 904 ante.

9 For the meaning of 'compensation payment' see PARA 904 note 1 ante.

10 Social Security (Recovery of Benefits) Act 1997 s 5(5).

11 Ibid s 5(6).





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*(b) Review and Appeals*

**UPDATE**

**907 Information contained in certificates**

NOTE 2--Definition of 'benefit' amended: SI 2008/1554.

**908. Review of certificates of recoverable benefits.**

The Secretary of State may review any certificate of recoverable benefits<sup>1</sup> if he is satisfied that it was issued in ignorance of, or was based on a mistake as to, a material fact, or that a mistake (whether in computation or otherwise) has occurred in its preparation<sup>2</sup>. On such a review the Secretary of State may either confirm the certificate or issue a fresh certificate containing such variations as he considers appropriate<sup>3</sup>; but he may not vary the certificate so as to increase the total amount of the recoverable benefits unless it appears to him that the variation is required as a result of the person who applied for the certificate supplying him with incorrect or insufficient information<sup>4</sup>.

1 As to certificates of recoverable benefits see PARA 906 ante.

2 Social Security (Recovery of Benefits) Act 1997 s 10(1).

3 Ibid s 10(2).

4 Ibid s 10(3).

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### **909. Appeals against certificates of recoverable benefits.**

An appeal against a certificate of recoverable benefits<sup>1</sup> may be made on the ground:

- 22 (1) that any amount, rate or period specified in the certificate is incorrect; or
- 23 (2) that listed benefits<sup>2</sup> which have been, or are likely to be, paid otherwise than in respect of the accident, injury or disease in question have been brought into account<sup>3</sup>.

An appeal may be made by the person who applied for the certificate of recoverable benefits, or, in a case where the amount of the compensation payment has been calculated so as to be reduced<sup>4</sup>, the injured person<sup>5</sup> or other person to whom the payment is made<sup>6</sup>. No such appeal may, however, be made until the claim giving rise to the compensation payment<sup>7</sup> has been finally disposed of<sup>8</sup> and the liability to make payment to the Secretary of State<sup>9</sup> has been discharged<sup>10</sup>.

Regulations<sup>11</sup> may make provision:

- 24 (a) as to the manner in which, and the time within which, such appeals may be made;
- 25 (b) as to the procedure to be followed where such an appeal is made; and
- 26 (c) for the purpose of enabling any such appeal to be treated as an application for review<sup>12</sup> by the Secretary of State<sup>13</sup>.

The system of appeals is, however, prospectively changed by the Social Security Act 1998<sup>14</sup>.

1 As to certificates of recoverable benefits see PARA 906 ante.

2 For the meaning of 'listed benefits' see PARA 904 note 2 ante.

3 Social Security (Recovery of Benefits) Act 1997 s 11(1).

4 Ie calculated under *ibid* s 8: see PARA 919 post.

5 For the meaning of 'the injured person' see PARA 904 ante.

6 Social Security (Recovery of Benefits) Act 1997 s 11(2).

7 For the meaning of 'compensation payment' see PARA 904 note 1 ante.

8 For these purposes, if an award of damages in respect of a claim has been made under or by virtue of the Supreme Court Act 1981 s 32A(2)(a) (as added), the Administration of Justice Act 1982 s 12(2)(a) (provisions relating to Scotland) or the County Courts Act 1984 s 51(2)(a) (orders for provisional damages in personal injury cases: see PARA 878 ante), the claim is to be treated as having been finally disposed of: Social Security (Recovery of Benefits) Act 1997 s 11(4).

9 Ie under *ibid* s 6: see PARA 915 post.

10 *Ibid* s 11(3).

11 For the meaning of 'regulations' see PARA 904 note 6 ante.

12 le under the Social Security (Recovery of Benefits) Act 1997 s 10: see PARA 908 ante.

13 Ibid s 11(5). Regulations under head (c) in the text may, among other things, provide that the circumstances in which a review may be carried out are not to be restricted to those specified in s 10(1): s 10(6). See the Social Security (Recovery of Benefits) Appeals Regulations 1997, SI 1997/2237, which came into force on 6 October 1997: reg 1(1).

Any appeal against a certificate of recoverable benefits must be in writing on a form approved by the Secretary of State and must be given or sent to the Compensation Recovery Unit (1) not later than three months after the date the compensator discharged the liability under the Social Security (Recovery of Benefits) Act 1997 s 6; (2) where the certificate is reviewed by the Secretary of State in accordance with regulations made under s 11(5) (c), not later than three months after the date the certificate is confirmed, or, as the case may be, a fresh certificate is issued; or (3) where an agreement is made under which an earlier compensation payment is treated as having been made in final discharge of a claim made by or in respect of an injured person and arising out of the accident, injury or disease, not later than three months after the date of that agreement: Social Security (Recovery of Benefits) Appeals Regulations 1997, SI 1997/2237, reg 2(1). The time so specified for the making of any appeal may be extended, even though the time so specified may already have expired, provided the conditions set out in reg 2(3)-(7) are satisfied; and any application for an extension of time under this provision must be made to the Compensation Recovery Unit and must be determined by a chairman of a medical appeal tribunal: reg 2(2). Where the time specified for the making of an appeal has already expired, an application for an extension of time for making an appeal may not be granted unless the applicant has satisfied the chairman considering the application that if the application is granted there are reasonable prospects that such an appeal will be successful, and that it is in the interests of justice that the application be granted: reg 2(3). It is not to be considered to be in the interests of justice to grant an application unless the chairman considering the application is satisfied that: (a) special reasons exist, which are wholly exceptional and which relate to the history or facts of the case; and (b) such special reasons have existed throughout the period beginning with the day following the expiry of the time specified for the making of an appeal and ending with the day on which the application for an extension of time is made; and (c) such special reasons manifestly constitute a reasonable excuse of compelling weight for the applicant's failure to make an appeal within the time specified: reg 2(4). In determining whether there are special reasons for granting an application for an extension of time for making an appeal under reg 2(2) the chairman considering the application must have regard to the principle that the greater the amount of time that has elapsed between the expiry of the time specified for the making of the appeal and the making of the application for an extension of time, the more cogent should be the special reasons on which the application is based: reg 2(5). In determining whether facts constitute special reasons for granting an application for an extension of time for making an appeal under reg 2(2) no account must be taken of the fact that the applicant or anyone acting for him or advising him was unaware of or misunderstood the law applicable to his case (including ignorance or misunderstanding of any time limits imposed by reg 2(1)) or that a commissioner or a court has taken a different view of the law from that previously understood and applied: reg 2(6). As to the Compensation Recovery Unit see PARA 905 note 13 ante.

Notwithstanding reg 2(2), no appeal may in any event be brought later than six years after the beginning of the period specified in reg 2(1), or if more than one such period is relevant, the one beginning later or latest: reg 2(7). An application under reg 2(2) for an extension of time which has been refused may not be renewed: reg 2(8).

Any appeal or application under the Social Security (Recovery of Benefits) Appeals Regulations 1997, SI 1997/2237, must contain the following particulars: (i) in the case of an appeal, the date of the certificate of recoverable benefits or review decision of the Secretary of State against which the appeal is made, the question under the Social Security (Recovery of Benefits) Act 1997 s 11 to which the appeal relates, and a summary of the arguments relied on by the person making the appeal to support his contention that the certificate is wrong; (ii) in the case of an application for an extension of time in which to appeal, in relation to the appeal which it is proposed to bring, the particulars required under head (i) supra together with particulars of the special reasons on which the application is based: Social Security (Recovery of Benefits) Appeals Regulations 1997, SI 1997/2237, reg 2(9). Where the appeal or application for an extension of time is made by the injured person or other person to whom a compensation payment has been made, there must be sent with that appeal or application a copy of the statement given to that person under the Social Security (Recovery of Benefits) Act 1997 s 9 or, if that statement was not in writing, a written summary of it: Social Security (Recovery of Benefits) Appeals Regulations 1997, SI 1997/2237, reg 2(10).

Where an appeal is not made on the form approved for the time being, but is made in writing, contains all the particulars required under reg 2(9) and, where applicable, is accompanied by the document required under reg 2(10), the Secretary of State may treat that appeal as duly made: reg 2(11). Where it appears to the Secretary of State that an appeal or application does not contain the particulars required under reg 2(9) or is not accompanied by the document required under reg 2(10) he may direct the person making the appeal or application to provide such particulars or such document: reg 2(12). Where reg 2(12) applies, the Secretary of State may extend the time specified by this regulation for making the appeal or application by a period of not more than 14 days: reg 2(13). Where further particulars or a document are required under reg 2(12) they must

be sent or delivered to the Compensation Recovery Unit within such period as the Secretary of State may direct: reg 2(14).

The date of an appeal is to be the date on which all the particulars required under reg 2(9) and, where applicable, the document required under reg 2(10) are received by the Compensation Recovery Unit: reg 2(15). In the case of an application for an extension of time for making an appeal, the chairman who determines that application must record his decision in writing together with a statement of the reasons for the decision: reg 2(16). As soon as practicable after the decision has been made, it must be communicated to the applicant and to the Secretary of State and if within three months of such communication being sent the applicant or the Secretary of State so requests in writing, a copy of the record referred to in reg 2(16) must be supplied to the person making that request: reg 2(17).

The Secretary of State may treat any appeal as an application for review under the Social Security (Recovery of Benefits) Act 1997 s 10, notwithstanding that a condition specified in 10(1)(a) or (b) is not satisfied: Social Security (Recovery of Benefits) Appeals Regulations 1997, SI 1997/2237, reg 2(18).

Where, by any provision of the Social Security (Recovery of Benefits) Appeals Regulations 1997, SI 1997/2237, any notice or other document is required to be given or sent to the Compensation Recovery Unit, or the clerk to or a chairman of a tribunal, that notice or document is treated as having been so given or sent on the day that it is received in the office of the Compensation Recovery Unit or of the clerk to the relevant tribunal, as appropriate; and where by any such provision any notice or other document is required to be given or sent to any other person, that notice or document, if sent by post to that person's last known or notified address, is treated as having been given or sent on the day that it was posted: reg 1(4).

14 See the Social Security Act 1998 ss 4-7, Sch 1 (not in force at the date at which this volume states the law).

## **UPDATE**

### **909 Appeals against certificates of recoverable benefits**

NOTE 8--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 13--SI 1997/2237 replaced by Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991: see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 356A.13). As to late appeals, see reg 32 (amended by SI 2008/2683).

TEXT AND NOTE 14--Social Security Act 1998 ss 4-7, Sch 1 repealed: SI 2008/2833.

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### **910. Reference of questions to medical appeal tribunal.**

The Secretary of State must refer to a medical appeal tribunal<sup>1</sup> any question mentioned below arising for determination on an appeal<sup>2</sup> against a certificate of recoverable benefits<sup>3</sup>. The questions are any concerning:

- 27 (1) any amount, rate or period specified in the certificate of recoverable benefits; or
- 28 (2) whether listed benefits<sup>4</sup> which have been, or are likely to be, paid otherwise than in respect of the accident, injury or disease in question have been brought into account<sup>5</sup>.

In determining any question referred to it under this provision, the tribunal must take into account any decision of a court relating to the same, or any similar, issue arising in connection with the accident, injury or disease in question<sup>6</sup>.

On such a reference a medical appeal tribunal may either:

- 29 (a) confirm the amounts, rates and periods specified in the certificate of recoverable benefits; or
- 30 (b) specify any variations which are to be made on the issue of a fresh certificate<sup>7</sup>.

When the Secretary of State has received the decisions of the tribunal on the questions referred to it, he must in accordance with those decisions either confirm the certificate against which the appeal was brought, or issue a fresh certificate<sup>8</sup>.

Regulations<sup>9</sup> may make provision as to the manner in which, and the time within which, such a reference is to be made and as to the procedure to be followed where such a reference is made<sup>10</sup>.

The system of appeals is, however, prospectively changed by the Social Security Act 1998<sup>11</sup>.

1 For these purposes, 'medical appeal tribunal' means a medical appeal tribunal constituted under the Social Security Administration Act 1992 s 50 (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 381); Social Security (Recovery of Benefits) Act 1997 s 12(8).

2 Ie under *ibid* s 11: see PARA 909 ante.

3 *Ibid* s 12(1). As to certificates of recoverable benefits see PARA 906 ante.

4 For the meaning of 'listed benefits' see PARA 904 note 2 ante.

5 Social Security (Recovery of Benefits) Act 1997 s 12(2).

6 *Ibid* s 12(3).

7 *Ibid* s 12(4).

8 *Ibid* s 12(5).

9 For the meaning of 'regulations' see PARA 904 note 6 ante.

10 Social Security (Recovery of Benefits) Act 1997 s 12(6). Such procedural regulations may (among other things) provide for the non-disclosure of medical advice or medical evidence given or submitted following a reference under s 12(1): s 12(7). See the Social Security (Recovery of Benefits) Appeals Regulations 1997, SI 1997/2237, reg 8. Where, in connection with the consideration of any question, there is before a tribunal medical advice or medical evidence relating to a person which has not been disclosed to him, and in the opinion of the chairman of the tribunal the disclosure to that person of that advice or evidence would be harmful to his health, such advice or evidence is not required to be disclosed: reg 8(1). Such evidence must not be disclosed to any person acting for or representing the person to whom it relates unless the chairman is satisfied that it is in the interests of the person to whom the evidence relates to do so: reg 8(2). A tribunal is not, however, precluded from taking into account for the purposes of the determination evidence which has not been disclosed to a person under these provisions: reg 8(3).

As to procedure before tribunals see generally reg 3. Where a reference is made to a tribunal, the clerk to the tribunal must direct every party to the proceedings to notify him if that party wishes an oral hearing of that reference to be held: reg 4(1). The notification must be in writing and must be made within 10 days of receipt of the direction from the clerk to the tribunal or within such other period as the clerk to the tribunal or the chairman of the tribunal may direct: reg 4(2). Where the clerk to the tribunal receives such a notification the tribunal must hold an oral hearing: reg 4(3). The chairman of a tribunal may of his own motion require an oral hearing to be held if he is satisfied that such a hearing is necessary to enable the tribunal to reach a decision: reg 4(4). As to procedure at oral hearings see reg 5. A hearing may be postponed or adjourned: see reg 6.

11 See the Social Security Act 1998 ss 4-7, Sch 1 (not in force at the date at which this volume states the law).

## UPDATE

### 910 Reference of questions to medical appeal tribunal

TEXT AND NOTES--The functions of the medical appeal tribunal have been transferred to the First-tier Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684. An appeal from the First-tier Tribunal lies to the Upper Tribunal (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A). Social Security (Recovery of Benefits) Act 1997 ss 4-7, Sch 1 repealed, s 12 amended: SI 2008/2833.

NOTE 10--SI 1997/2237 replaced by Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991: see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 356A.13. As to procedure generally, see regs 30, 33 (both amended by SI 2008/2683).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(iii) Deductions/B. RECOVERY OF SOCIAL SECURITY BENEFITS/(B) Certificates of Recoverable Benefits/(b) Review and Appeals/911. Withdrawal of appeals.

### **911. Withdrawal of appeals.**

Any appeal may be withdrawn by the person who made the appeal:

- 31 (1) before a question has been referred to a tribunal<sup>1</sup> by written notice in writing to the Compensation Recovery Unit<sup>2</sup> and with the consent of the Secretary of State;
- 32 (2) after the reference has been made and before the hearing begins, by written notice to the chairman of the tribunal to which a question was referred and with the written consent of the Secretary of State;
- 33 (3) after the hearing has begun, at any time before the determination is made with the leave of the chairman of the tribunal and the consent of the Secretary of State<sup>3</sup>.

The system of appeals is, however, prospectively changed by the Social Security Act 1998<sup>4</sup>.

1 le under the Social Security (Recovery of Benefits) Act 1997 s 12: see PARA 910 ante.

2 As to the Compensation Recovery Unit see PARA 905 note 13 ante.

3 Social Security (Recovery of Benefits) Appeals Regulations 1997, SI 1997/2237, reg 7.

4 See the Social Security Act 1998 ss 4-7, Sch 1 (not in force at the date at which this volume states the law).

### **UPDATE**

#### **911 Withdrawal of appeals**

NOTE 3--SI 1997/2237 replaced by Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991: see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 356A.13.

TEXT AND NOTE 11--Social Security Act 1998 ss 4-7, Sch 1 repealed: SI 2008/2833.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(iii) Deductions/B. RECOVERY OF SOCIAL SECURITY BENEFITS/(B) Certificates of Recoverable Benefits/(b) Review and Appeals/912. Decisions of tribunals.

## **912. Decisions of tribunals.**

The decision of the majority of the tribunal must be the decision of the tribunal<sup>1</sup>. Every decision of a tribunal must be recorded in summary by the chairman in such written form of decision notice as has been approved by the President<sup>2</sup>, and that decision notice must be signed by the chairman<sup>3</sup>. As soon as may be practicable after a case has been decided by a tribunal, a copy of the decision notice must be sent or given to every party to the proceedings<sup>4</sup> who must also be informed of his right to a copy of the statement of reasons and findings<sup>5</sup> and of the conditions governing appeals to a commissioner<sup>6</sup>.

A statement of the reasons for the tribunal's decision and of its findings on questions of fact material to it may be given orally at the hearing or in writing at such later date as the chairman may determine<sup>7</sup>. Where the statement is given orally, it must be recorded in such medium as the chairman may determine<sup>8</sup>; and if a decision is not unanimous, the statement must record that one of the members dissented and the reasons given by him for dissenting<sup>9</sup>. A copy of the statement must be supplied to the parties to the proceedings if requested by any of them within 21 days after the decision notice has been sent or given, and if the statement was given orally at the hearing, that copy must be supplied in such medium as the chairman may direct<sup>10</sup>.

A record of the proceedings at the hearing must be made by the chairman in such medium as he may direct and preserved by the clerk to the tribunal for 18 months, and a copy of that record must be supplied to the parties if requested by any of them within that period<sup>11</sup>. Provision is made for the correction of accidental errors in decisions<sup>12</sup> and for the setting aside of decisions on certain grounds<sup>13</sup>.

The system of appeals is, however, prospectively changed by the Social Security Act 1998<sup>14</sup>.

1 Social Security (Recovery of Benefits) Appeals Regulations 1997, SI 1997/2237, reg 9(1).

2 'President' means the President of social security appeal tribunals, medical appeal tribunals and disability appeal tribunals appointed under the Social Security Administration Act 1992 s 51(1) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 356): Social Security (Recovery of Benefits) Appeals Regulations 1997, SI 1997/2237, reg 1(2).

3 Ibid reg 9(2).

4 For these purposes, a reference to the parties to the proceedings is a reference to the Secretary of State and any person entitled under the Social Security (Recovery of Benefits) Act 1997 s 11(2) (see PARA 909 ante) to make an appeal: Social Security (Recovery of Benefits) Appeals Regulations 1997, SI 1997/2237, reg 1(2).

5 He has his right under ibid reg 9(6): see the text and note 10 infra.

6 Ibid reg 9(3). As to appeals to a commissioner see PARA 914 post.

7 Ibid reg 9(4).

8 Ibid reg 9(5).

9 Ibid reg 9(7).

10 Ibid reg 9(6).

11 Ibid reg 9(8).



12 Subject to *ibid* reg 12 (provisions common to regs 10, 11: see note 13 *infra*) accidental errors in any decision or record of a decision may at any time be corrected by the tribunal which gave the decision or by another medical appeal tribunal: reg 10(1). A correction made to, or to the record of, a decision must be deemed to be part of the decision or of that record and written notice of it must be given as soon as practicable to every party to the proceedings: reg 10(2).

13 Subject to *ibid* reg 12, on an application made by a party to the proceedings, a decision may be set aside by the tribunal which gave the decision or by another medical appeal tribunal in a case where it appears just to set the decision aside on the ground that: (1) a document relating to the proceedings in which the decision was given was not sent to, or was not received at an appropriate time by, a party to the proceedings or the party's representative or was not received at an appropriate time by the tribunal which gave the decision; or (2) a party to the proceedings in which the decision was given or the party's representative was not present at a hearing relating to the proceedings; or (3) the interests of justice so require: reg 11(1). In determining whether it is just to set aside a decision on the ground set out in head (2) *supra*, the tribunal must determine whether the party making the application gave a notification to the clerk of the tribunal that he wished an oral hearing to be held, and if that party did not give such a notification the tribunal must not set the decision aside unless it is satisfied that the interests of justice manifestly so require: reg 11(2). An application under reg 11 must be made in writing, must be given or sent to the office of the clerk to the tribunal which made the relevant decision not later than three months after the date when notice of the tribunal's decision was sent or given to the applicant and must contain particulars of the grounds on which it is made: reg 11(3). The time specified in reg 11(3) for the making of an application may be extended for special reasons, even though the time so specified may already have expired, by the chairman of the tribunal; and reg 2(16), (17) (recording reasons for a decision and providing a copy of the record: see PARA 909 note 13 *ante*) applies in relation to any determination by a chairman: reg 11(4). Where an application to set aside a decision is entertained under reg 11(1), every party to the proceedings must be sent a copy of the application and must be afforded a reasonable opportunity of making representations on it before the application is determined: reg 11(5).

Notice in writing of a determination on an application to set aside a decision must be given to every party to the proceedings as soon as may be practicable and the notice must contain a statement giving the reasons for the determination: reg 11(6). For the purposes of determining an application to set aside a decision there must be disregarded reg 1(4) (see PARA 909 note 13 *ante*) and any provision in any enactment or instrument to the effect that any notice or other document required or authorised to be given or sent to any person must be deemed to have been given or sent if it was sent by post to that person's last known or notified address: reg 11(7).

In calculating any time specified in reg 11 or in reg 13, there must be disregarded any day falling before the day on which notice was given of a correction of a decision or the record thereof pursuant to reg 10 or on which notice is given of a determination that a decision is not to be set aside following an application made under reg 11, as the case may be: reg 12(1). Without prejudice to provisions for appeals to commissioners, there is no other appeal against a correction made under reg 10 or a refusal to make such a correction or against a determination given under reg 11: reg 12(2). Nothing in reg 10 or reg 11 must be construed as derogating from any power to correct errors or set aside decisions which is exercisable apart from the Social Security (Recovery of Benefits) Appeals Regulations 1997, SI 1997/2237: reg 12(3).

14 See the Social Security Act 1998 ss 4-7, Sch 1 (not in force at the date at which this volume states the law).

## **UPDATE**

### **912 Decisions of tribunals**

NOTES--SI 1997/2237 replaced by Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991: see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 356A.13.

TEXT AND NOTE 14--Social Security Act 1998 ss 4-7, Sch 1 repealed: SI 2008/2833.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(iii) Deductions/B. RECOVERY OF SOCIAL SECURITY BENEFITS/(B) Certificates of Recoverable Benefits/(b) Review and Appeals/913. Adjustments.

### **913. Adjustments.**

The following provisions apply in cases where a fresh certificate of recoverable benefits<sup>1</sup> is issued as a result of a review<sup>2</sup> or an appeal<sup>3</sup>. If a person has made one or more payments of the amount of benefits to the Secretary of State<sup>4</sup> and, in consequence of the review or appeal, it appears that the total amount paid is more than the amount that ought to have been paid, regulations<sup>5</sup> may provide for the Secretary of State to pay the difference to that person, or to the person to whom the compensation payment<sup>6</sup> is made, or partly to one and partly to the other<sup>7</sup>. If, on the other hand, a person has made one or more such payments to the Secretary of State<sup>8</sup> and, in consequence of the review or appeal, it appears that the total amount paid is less than the amount that ought to have been paid, regulations may provide for that person to pay the difference to the Secretary of State<sup>9</sup>.

Such regulations may provide:

- 34 (1) for the recalculation<sup>10</sup> of the amount of any compensation payment;
- 35 (2) for giving credit for amounts already paid; and
- 36 (3) for the payment by any person of any balance or the recovery from any person of any excess,

and may provide for any matter by modifying the Social Security (Recovery of Benefits) Act 1997<sup>11</sup>.

The system of appeals is, however, prospectively changed by the Social Security Act 1998<sup>12</sup>.

1 As to certificates of recoverable benefits see PARA 906 ante.

2 Ie under the Social Security (Recovery of Benefits) Act 1997 s 10: see PARA 908 ante.

3 Ibid s 14(1). The appeal referred to in the text is an appeal under s 11: see PARA 909 ante.

4 Ie under ibid s 6: see PARA 915 post.

5 For the meaning of 'regulations' see PARA 904 note 6 ante.

6 For the meaning of 'compensation payment' see PARA 904 note 1 ante.

7 Social Security (Recovery of Benefits) Act 1997 s 14(2).

8 See note 4 supra.

9 Social Security (Recovery of Benefits) Act 1997 s 14(3).

10 Ie in accordance with ibid s 8: see PARA 919 post.

11 Ibid s 14(4). Where the conditions specified in s 14(1) and s 14(2)(a), (b) are satisfied, the Secretary of State must pay the difference between the amount that has been paid and the amount that ought to have been paid to the compensator: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 11(1). Where the conditions specified in the Social Security (Recovery of Benefits) Act 1997 s 14(1) and s 14(3)(a), (b) are satisfied, the compensator must pay the difference between the total amounts paid and the amount that ought to have been paid to the Secretary of State: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 11(2).

Where the Secretary of State is making a refund under reg 11(1), or demanding payment of a further amount under reg 11(2), he must send to the compensator (with the refund or demand) and to the person to whom the compensation payment was made a statement showing (1) the total amount that has already been paid to the Secretary of State; (2) the amount that ought to have been paid; and (3) the difference, and whether a repayment by the Secretary of State or a further payment to him is required: reg 11(3).

Where the amount of the compensation payment by the compensator was calculated under the Social Security (Recovery of Benefits) Act 1997 s 8 (see PARA 919 post) and the Secretary of State has made a payment under the Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 11(1), the amount of the compensation payment must be recalculated under the Social Security (Recovery of Benefits) Act 1997 s 8 to take account of the fresh certificate of recoverable benefits and the compensator must pay the amount of the increase (if any) to the person to whom the compensation payment was made: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 11(4), (5). Where, however, the amount of the compensation payment made by the compensator was so calculated, the compensator has made a payment under reg 11(2), and the fresh certificate of recoverable benefits issued after the review or appeal was required as a result of the injured person or other person to whom the compensation payment was made supplying to the compensator information knowing it to be incorrect or insufficient with the intent of enhancing the compensation payment so calculated, and the compensator supplying that information to the Secretary of State without knowing it to be incorrect or insufficient, then the compensator may recalculate the compensation payment under the Social Security (Recovery of Benefits) Act 1997 s 8 to take account of the fresh certificate of recoverable benefits and may require the repayment to him by the person to whom he made the compensation payment of the difference (if any) between the payment made and the payment as so recalculated: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 11(6), (7).

12 See the Social Security Act 1998 ss 4-7, Sch 1 (not in force at the date at which this volume states the law).

## **UPDATE**

### **913 Adjustments**

NOTE 11--See *Bruce v Genesis Fast Food Ltd* [2003] EWHC 788 (QB), [2004] PIQR P113.

TEXT AND NOTE 12--Social Security Act 1998 ss 4-7, Sch 1 repealed: SI 2008/2833.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(iii) Deductions/B. RECOVERY OF SOCIAL SECURITY BENEFITS/(B) Certificates of Recoverable Benefits/(b) Review and Appeals/914. Appeal to social security commissioner.

#### **914. Appeal to social security commissioner.**

An appeal may be made to a commissioner<sup>1</sup> against any decision of a medical appeal tribunal<sup>2</sup> on the ground that the decision was erroneous in point of law<sup>3</sup>. Such an appeal may be made by:

- 37 (1) the Secretary of State;
- 38 (2) the person who applied for the certificate of recoverable benefits<sup>4</sup>; or
- 39 (3) (in a case where the amount of the compensation payment<sup>5</sup> has been calculated in accordance with the provisions for reduction)<sup>6</sup> the injured person<sup>7</sup> or other person to whom the payment is made<sup>8</sup>.

Subject to the following provisions, an application to the chairman of a tribunal for leave to appeal to a commissioner from a decision of a tribunal must:

- 40 (a) be made in writing;
- 41 (b) be given or sent to the office of the clerk to the tribunal which made the relevant decision not later than three months after the date when a notice of the tribunal's decision was sent or given to the applicant;
- 42 (c) contain particulars of the grounds on which it is made; and
- 43 (d) have annexed thereto a copy of the statement of the reasons for the tribunal's decision<sup>9</sup>.

Where an application for leave to appeal is made by the Secretary of State, the clerk to the tribunal must, as soon as may be practicable, send a copy of the application to every other party to the proceedings<sup>10</sup>.

The decision of the chairman on an application for leave to appeal must be recorded in writing and copies must be given or sent to every party to the proceedings<sup>11</sup>. Where in any case it is impracticable, or it will be likely to cause undue delay, for an application for leave to appeal against the decision of a tribunal to be determined by the person who was the chairman of that tribunal, that application must be determined by any other person eligible to be nominated to act<sup>12</sup> as a chairman of a medical appeal tribunal<sup>13</sup>.

A person who has made an application to the chairman of the tribunal for leave to appeal to a commissioner against a decision of a tribunal may withdraw his application at any time before it is determined by giving written notice of intention to withdraw to the chairman<sup>14</sup>.

1 For these purposes, 'commissioner' has the same meaning as in the Social Security Administration Act 1992 (see s 191; and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 30): Social Security (Recovery of Benefits) Act 1997 s 13(4).

2 le under ibid s 12: see PARA 910 ante.

3 Ibid s 13(1).

4 As to certificates of recoverable benefits see PARA 906 ante.

- 5 For the meaning of 'compensation payment' see PARA 904 note 1 ante.
- 6 le in accordance with the Social Security (Recovery of Benefits) Act 1997 s 8: see PARA 919 post.
- 7 For the meaning of 'the injured person' see PARA 904 ante.
- 8 Social Security (Recovery of Benefits) Act 1997 s 13(2). The Social Security Administration Act 1992 s 23(7)-(10) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 363) applies to appeals under this provision as it applies to appeals under s 23: Social Security (Recovery of Benefits) Act 1997 s 13(3).
- 9 Social Security (Recovery of Benefits) Appeals Regulations 1997, SI 1997/2237, reg 13(1). As to the statement of reasons see reg 9(4); and PARA 912 ante.
- 10 Ibid reg 13(2).
- 11 Ibid reg 13(3).
- 12 le under the Social Security Administration Act 1992 s 50(4): see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 381.
- 13 Social Security (Recovery of Benefits) Appeals Regulations 1997, SI 1997/2237, reg 13(4).
- 14 Ibid reg 13(5).

## **UPDATE**

### **914 Appeal to [the Upper Tribunal]**

TEXT AND NOTES--The functions of the commissioner has been transferred to the Upper Tribunal: see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684; and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A. Social Security (Recovery of Benefits) Act 1997 s 13(1), (3) repealed, s 13(2) amended: SI 2008/2833.

NOTES 9-14--SI 1997/2237 replaced by Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991: see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 356A.13.

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## (C) LIABILITY OF PERSON PAYING COMPENSATION AND OF INSURERS

### **915. Liability to pay Secretary of State amount of benefits.**

A person who makes a compensation payment<sup>1</sup> in any case is liable to pay to the Secretary of State an amount equal to the total amount of the recoverable benefits<sup>2</sup>. This liability arises immediately before the compensation payment or, if there is more than one, the first of them is made<sup>3</sup> but no amount becomes payable under this provision before the end of the period of 14 days following the day on which the liability arises<sup>4</sup>. Subject to that, an amount becomes payable under this provision at the end of the period of 14 days beginning with the day on which a certificate of recoverable benefits<sup>5</sup> is first issued showing that the amount of recoverable benefit to which it relates has been or is likely to have been paid before a specified date<sup>6</sup>.

1 For the meaning of 'compensation payment' see PARA 904 note 1 ante.

2 Social Security (Recovery of Benefits) Act 1997 s 6(1). For the meaning of 'recoverable benefit' see PARA 904 note 2 ante.

3 Ibid s 6(2).

4 Ibid s 6(3).

5 As to certificates of recoverable benefits see PARA 906 ante.

6 Social Security (Recovery of Benefits) Act 1997 s 6(4).

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### **916. Recovery of payments due to Secretary of State.**

Where a person has made a compensation payment<sup>1</sup> but either has not applied for a certificate of recoverable benefits<sup>2</sup>, or has not made a payment to the Secretary of State<sup>3</sup> before the end of the period allowed<sup>4</sup>, the Secretary of State may:

- 44 (1) issue the person who made the compensation payment with a certificate of recoverable benefits, if none has been issued; or
- 45 (2) issue him with a copy of the certificate of recoverable benefits or (if more than one has been issued) the most recent one,

and (in either case) issue him with a demand that payment of any amount due<sup>5</sup> be made immediately<sup>6</sup>. The Secretary of State may<sup>7</sup> recover the amount for which such a demand for payment is made from the person who made the compensation payment<sup>8</sup>. If the person who made the compensation payment resides or carries on business in England and Wales and a county court so orders, any amount so recoverable is recoverable by execution issued from the county court or otherwise as if it were payable under an order of that court<sup>9</sup>.

A document bearing a certificate which is signed by a person authorised to do so by the Secretary of State, and states that the document, apart from the certificate, is a record of the amount recoverable under these provisions, is conclusive evidence that that amount is so recoverable<sup>10</sup>.

1 For the meaning of 'compensation payment' see PARA 904 note 1 ante.

2 As to certificates of recoverable benefits see PARA 906 ante; and for the meaning of 'recoverable benefit' see PARA 904 note 2 ante.

3 Ie under the Social Security (Recovery of Benefits) Act 1997 s 6: see PARA 915 ante.

4 Ie the period allowed under ibid s 6: see PARA 915 ante.

5 See note 3 supra.

6 Social Security (Recovery of Benefits) Act 1997 s 7(1), (2).

7 Ie in accordance with ibid s 7(4), (5): see the text and note 9 infra.

8 Ibid s 7(3).

9 Ibid s 7(4). If the person who made the payment resides or carries on business in Scotland, any amount so recoverable may be enforced in like manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland: s 7(5).

10 Ibid s 7(6). A certificate under s 7(6) purporting to be signed by a person authorised to do so by the Secretary of State is to be treated as so signed unless the contrary is proved: s 7(7).

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**917. Amounts overpaid to Secretary of State.**

Regulations<sup>1</sup> may make provision, including provision modifying the Social Security (Recovery of Benefits) Act 1997, for cases where a person has paid to the Secretary of State<sup>2</sup> any amount ('the amount of the overpayment') which he was not liable to pay<sup>3</sup>. The regulations may provide:

- 46 (1) for the Secretary of State to pay the amount of the overpayment to that person, or to the person to whom the compensation payment<sup>4</sup> is made, or partly to one and partly to the other; or
- 47 (2) for the receipt by the Secretary of State of the amount of the overpayment to be treated as the recovery of that amount<sup>5</sup>.

The regulations may also, among other things, provide:

- 48 (a) for the recalculation<sup>6</sup> of the amount of any compensation payment;
- 49 (b) for giving credit for amounts already paid; and
- 50 (c) for the payment by any person of any balance or the recovery from any person of any excess<sup>7</sup>.

1 For the meaning of 'regulations' see PARA 904 note 6 ante.

2 Ie under the Social Security (Recovery of Benefits) Act 1997 s 6: see PARA 915 ante.

3 Ibid s 20(1).

4 For the meaning of 'compensation payment' see PARA 904 note 1 ante.

5 Social Security (Recovery of Benefits) Act 1997 s 20(2). Regulations made by virtue of s 20(2)(b) (see head (2) in the text) are to have effect in spite of anything in the Social Security Administration Act 1992 s 71 (as amended) (overpayments in general: see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 385 et seq): Social Security (Recovery of Benefits) Act 1997 s 20(3).

6 Ie in accordance with ibid s 8: see PARA 919 post.

7 Ibid s 20(4). Section 20 does not apply in a case where s 14 (see PARA 913 post) applies: s 20(5).

At the date at which this volume states the law, no regulations under s 20 had been made.



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### **918. Liability of insurers.**

If a compensation payment<sup>1</sup> is made in a case where a person is liable to any extent in respect of the accident, injury or disease, and the liability is covered to any extent by a policy of insurance<sup>2</sup>, the policy is also to be treated as covering any liability of that person to make payments of the amount of benefits<sup>3</sup> to the Secretary of State<sup>4</sup>. The liability so imposed on the insurer cannot be excluded or restricted<sup>5</sup>; and for this purpose excluding or restricting liability includes:

- 51 (1) making the liability or its enforcement subject to restrictive or onerous conditions;
- 52 (2) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy; or
- 53 (3) excluding or restricting rules of evidence or procedure<sup>6</sup>.

Regulations<sup>7</sup> may, however, in prescribed cases<sup>8</sup> limit the amount of the liability so imposed on the insurer<sup>9</sup>.

These provisions apply to policies of insurance issued before, as well as those issued after, 6 October 1997<sup>10</sup>.

1 For the meaning of 'compensation payment' see PARA 904 note 1 ante.

2 References in the Social Security (Recovery of Benefits) Act 1997 s 22 to policies of insurance and their issue include references to contracts of insurance and their making: s 22(6).

3 Ie any liability under ibid s 6: see PARA 915 ante.

4 See ibid s 22(1).

5 Ibid s 22(2).

6 Ibid s 22(3).

7 For the meaning of 'regulations' see PARA 904 note 6 ante.

8 For the meaning of 'prescribed' see PARA 904 note 6 ante.

9 Social Security (Recovery of Benefits) Act 1997 s 22(4).

10 Ibid s 22(6); Social Security (Recovery of Benefits) Act 1997 (Commencement) Order 1997, SI 1997/2085, art 2(2).

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## (D) REDUCTION OR DISREGARD OF COMPENSATION PAYMENT

### 919. Reduction of payment.

These provisions apply in a case where, in relation to any listed head of compensation<sup>1</sup>, any of the compensation payment<sup>2</sup> is attributable to that head and any recoverable benefit<sup>3</sup> is shown against that head<sup>4</sup> as a listed benefit<sup>5</sup>. In such a case, any claim of a person to receive the compensation payment is to be treated for all purposes as discharged if:

- 54 (1) he is paid the amount, if any, of the compensation payment calculated in accordance with these provisions; and
- 55 (2) if the amount of the compensation payment so calculated is nil, he is given a statement saying so by the person who would otherwise have paid the gross amount of the compensation payment<sup>6</sup>.

For each listed head of compensation for which heads (1) and (2) above are met, so much of the gross amount of the compensation payment as is attributable to that head is to be reduced (to nil, if necessary) by deducting the amount of the recoverable benefit<sup>7</sup> or, as the case may be, the aggregate amount of the recoverable benefits shown against it<sup>8</sup>; and this provision has effect as if a requirement to reduce a payment by deducting an amount which exceeds that payment were a requirement to reduce that payment to nil<sup>9</sup>.

The amount of the compensation payment calculated in accordance with these provisions is the gross amount of the compensation payment less the sum of the reductions so made, and, accordingly, the amount may be nil<sup>10</sup>.

A person who makes a compensation payment calculated in accordance with these provisions must inform the person to whom the payment is made that the payment has been so calculated, and of the date for payment by reference to which the calculation has been made<sup>11</sup>. If the amount of a compensation payment so calculated is nil, a person giving a statement saying so is to be treated for the purposes of the Social Security (Recovery of Benefits) Act 1997 Act as making a compensation payment<sup>12</sup> on the day on which he gives the statement<sup>13</sup>.

Where a person makes a compensation payment calculated in accordance with the above provisions and, if the amount of the compensation payment so calculated is nil, gives a statement saying so, he is to be treated, for the purpose of determining any rights and liabilities in respect of contribution or indemnity, as having paid the gross amount of the compensation payment<sup>14</sup>.

1    le any head of compensation listed in the Social Security (Recovery of Benefits) Act 1997 s 8(1), Sch 2 col 1: s 8(1). Those heads of compensation are: (1) compensation for earnings lost during the relevant period; (2) compensation for cost of care incurred during the relevant period; and (3) compensation for loss of mobility during the relevant period: see Sch 2 col 1.

2    For the meaning of 'compensation payment' see PARA 904 note 1 ante.

3    For the meaning of 'recoverable benefit' see PARA 904 note 2 ante.

4    le in the Social Security (Recovery of Benefits) Act 1997 Sch 2 col 2: s 8(1).

5 Ibid s 8(1). As to the listed benefits see PARA 904 note 2 ante.

6 Ibid s 8(2).

7 For these purposes, the amount of any recoverable benefit is the amount determined in accordance with the certificate of recoverable benefits: ibid s 9(4)(b). As to certificates of recoverable benefits see PARA 906 ante.

8 Ibid s 8(3).

9 See ibid s 8(4).

10 Ibid s 8(5).

11 Ibid s 9(1).

12 Ie a payment within ibid s 1(1)(a).

13 Ibid s 9(2).

14 Ibid s 9(3). For these purposes, the gross amount of the compensation payment is the amount of the compensation payment apart from s 8: s 9(4).

## **UPDATE**

### **919 Reduction of payment**

NOTE 1--Interest on damages can properly be described as 'compensation for earnings lost' under Sch 2 and, as such, is subject to reduction on account of payments by a tortfeasor to the Secretary of State to reimburse benefits paid to a claimant as a result of the tortfeasor's wrong: *Griffiths v British Coal Corp*[2001] EWCA Civ 336, [2001] 1 WLR 1493. In Sch 2 col 1, 'earnings lost' refers to the gross income the claimant has lost as a result of his injuries minus any taxes, expenses or other costs which, as a result of his injuries, he no longer has to pay: *Chatwin v Lowther*[2003] EWCA Civ 729, [2003] PIQR Q5.

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## **920. Compensation payments to be disregarded.**

If, when a compensation payment<sup>1</sup> is made, the first and second conditions are met, the payment is to be disregarded for certain statutory purposes<sup>2</sup>. The first condition is that the person making the payment has made an application for a certificate of recoverable benefits<sup>3</sup> which complies with the specified requirements<sup>4</sup> and has in his possession a written acknowledgement of the receipt of his application<sup>5</sup>. The second condition is that the Secretary of State has not sent the certificate to the person, at the address, specified in the application, before the end of the period<sup>6</sup> allowed<sup>7</sup>.

In any case where a compensation payment is disregarded<sup>8</sup> for the purposes mentioned by virtue of these provisions, but the person who made the compensation payment nevertheless makes a payment to the Secretary of State for which he would otherwise be liable<sup>9</sup>, then these provisions cease to apply in relation to the compensation payment<sup>10</sup>.

If, in the opinion of the Secretary of State, circumstances have arisen which adversely affect normal methods of communication, he may by order provide that these provisions are not to apply during a specified period not exceeding three months, and he may continue any such order in force for further periods not exceeding three months at a time<sup>11</sup>.

1 For the meaning of 'compensation payment' see PARA 904 note 1 ante.

2 See the Social Security (Recovery of Benefits) Act 1997 s 21(1). The payment is to be disregarded for the purposes of s 6 (see PARA 915 ante) and s 8 (see PARA 919 ante): s 21(1).

3 As to certificates of recoverable benefits see PARA 906 ante.

4 An application complies with the specified requirements if it accurately states the prescribed particulars relating to the injured person and the accident, injury or disease in question, and specifies the name and address of the person to whom the certificate is to be sent: Social Security (Recovery of Benefits) Act 1997 s 21(2)(a), (3). The following particulars are prescribed for these purposes: (1) the full name and address of the injured person; (2) the date of birth and, where known, the national insurance number of that person; (3) where the liability arises or is alleged to arise in respect of an accident or injury, the date of the accident or injury; (4) the nature of the accident, injury or disease; (5) where the person liable, or alleged to be liable, in respect of the accident, injury or disease, is the employer of the injured person, or has been such an employer, the information prescribed by the Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 5 (see PARA 905 ante): reg 7(1). For the meaning of 'prescribed' see PARA 904 note 6 ante; and for the meaning of 'the injured person' see PARA 904 ante.

5 Social Security (Recovery of Benefits) Act 1997 s 21(2). An application for a certificate of recoverable benefits is to be treated for the purposes of the 1997 Act as received by the Secretary of State on the day on which it is received by the Compensation Recovery Unit, or if the application is received after normal business hours, or on a day which is not a normal business day at that office, on the next such day: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 7(2). As to the Compensation Recovery Unit see PARA 905 note 13 ante.

6 Ie the period allowed under the Social Security (Recovery of Benefits) Act 1997 s 4: see PARA 906 ante.

7 Ibid s 21(4).

8 Ie by virtue of ibid s 21(1): see note 2 supra.

9 Ie but for ibid s 21(1): s 21(5)(b).

10 Ibid s 21(5).

11 Ibid s 21(6).

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## (E) COURT ORDERS AND PAYMENTS INTO COURT

### **921. Court orders.**

Where a court makes an order for a compensation payment<sup>1</sup> to be made in any case, unless the order is made with the consent of the injured person<sup>2</sup> and the person by whom the payment is to be made, the court must, in the case of each listed head of compensation<sup>3</sup> to which any of the compensation payment is attributable, specify in the order the amount of the compensation payment which is attributable to that head<sup>4</sup>.

1 For the meaning of 'compensation payment' see PARA 904 note 1 ante.

2 For the meaning of 'the injured person' see PARA 904 ante.

3 In each head of compensation listed in the Social Security (Recovery of Benefits) Act 1997 s 8(1), Sch 2 col 1: see PARA 919 note 1 ante.

4 See *ibid* s 15(1), (2).

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## 922. Payments into court.

Regulations<sup>1</sup> may make provision, including provision modifying the Social Security (Recovery of Benefits) Act 1997, for any case in which a payment into court is made<sup>2</sup>. The regulations may (among other things) provide:

- 56 (1) for the making of a payment into court to be treated in prescribed<sup>3</sup> circumstances as the making of a compensation payment<sup>4</sup>;
- 57 (2) for application for, and issue of, certificates of recoverable benefits<sup>5</sup>; and
- 58 (3) for the relevant period<sup>6</sup> to be treated as ending on a date determined in accordance with the regulations<sup>7</sup>.

Rules of court may make provision governing practice and procedure in such cases<sup>8</sup>.

1 For the meaning of 'regulations' see PARA 904 note 6 ante.

2 Social Security (Recovery of Benefits) Act 1997 s 16(1).

3 For the meaning of 'prescribed' see PARA 904 note 6 ante. As to the prescribed circumstances see note 7 infra.

4 For the meaning of 'compensation payment' see PARA 904 note 1 ante.

5 As to the provision so made see note 7 infra. As to certificates of recoverable benefits see PARA 906 et seq ante.

6 For the meaning of 'the relevant period' see PARA 904 note 3 ante.

7 Social Security (Recovery of Benefits) Act 1997 s 16(2). Subject to the following provisions, where a party to an action makes a payment into court which, had it been paid directly to another party to the action ('the relevant party'), would have constituted a compensation payment: (1) the making of that payment must be treated for the purposes of the 1997 Act as the making of a compensation payment; (2) a current certificate of recoverable benefits must be lodged with the payment; and (3) where the payment is calculated under s 8 (see PARA 919 ante), the compensator must give the relevant party the information specified in s 9(1), instead of the person to whom the payment is made: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 8(1). The liability under the Social Security (Recovery of Benefits) Act 1997 s 6(1) to pay an amount equal to the total amount of the recoverable benefits (see PARA 915 ante) does not arise until the person making the payment into court has been notified that the whole or any part of the payment into court has been paid out of court or for the relevant party: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 8(2). A current certificate of recoverable benefits in head (2) supra means one that is in force as described in the Social Security (Recovery of Benefits) Act 1997 s 4(4) (see PARA 906 ante): Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 8(8).

Where a payment into court in satisfaction of his claim is accepted by the relevant party in the initial period, then as respects the compensator in question, the relevant period must be taken to have ended, if it has not done so already, on the day on which the payment into court (or if there were two or more such payments, the last of them) was made: reg 8(3). Where, after the expiry of the initial period, the payment into court is accepted in satisfaction of the relevant party's claim by consent between the parties, the relevant period ends, if it has not done so already, on the date on which application to the court for the payment is made; while where, after the expiry of the initial period, payment out of court is made wholly or partly to or for the relevant party in accordance with an order of the court and in satisfaction of his claim, the relevant period ends, if it has not done so already, on the date of that order: see reg 8(4), (5). In these provisions, 'the initial period' means the period of 21 days after the receipt by the relevant party to the action of notice of the payment into court having been made: reg 8(6).

Where a payment into court is paid out wholly to or for the party who made the payment (otherwise than to or for the relevant party to the action) the making of the payment into court ceases to be regarded as the making of a compensation payment: reg 8(7).

8 Social Security (Recovery of Benefits) Act 1997 s 16(3).

## **UPDATE**

### **922 Payments into court**

NOTES--As to the making of an order for costs following a payment into court under the transitional scheme provided by the 1997 Act, see *Bajwa v British Airways plc*; *Wilson v Mid-Glamorgan CC*; *Whitehouse v Smith* (1999) Times, 1 July, CA.



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## (F) COMPLEX CASES

### **923. Payments by more than one person.**

Regulations<sup>1</sup> may make provision, including provision modifying the Social Security (Recovery of Benefits) Act 1997, for any case in which two or more persons ('the compensators') make compensation payments<sup>2</sup> to or in respect of the same injured person<sup>3</sup> in consequence of the same accident, injury or disease<sup>4</sup>. In such a case, the sum of the liabilities of the compensators to pay amounts of benefit to the Secretary of State<sup>5</sup> is not to exceed the total amount of the recoverable benefits<sup>6</sup>, and the regulations may provide for determining the respective liabilities<sup>7</sup> of each of the compensators<sup>8</sup>.

The regulations may, among other things, provide in the case of each compensator:

- 59 (1) for determining or redetermining the part of the recoverable benefits which may be taken into account in his case;
- 60 (2) for calculating or recalculating<sup>9</sup> the amount of any compensation payment;
- 61 (3) for giving credit for amounts already paid; and
- 62 (4) for the payment by any person of any balance or the recovery from any person of any excess<sup>10</sup>.

1 For the meaning of 'regulations' see PARA 904 note 6 ante.

2 For the meaning of 'compensation payment' see PARA 904 note 1 ante.

3 For the meaning of 'injured person' see PARA 904 ante.

4 Social Security (Recovery of Benefits) Act 1997 s 19(1).

5 *Ie* under *ibid* s 6: see PARA 915 ante.

6 For the meaning of 'recoverable benefits' see PARA 904 note 2 ante.

7 See note 5 *supra*.

8 Social Security (Recovery of Benefits) Act 1997 s 19(2).

9 *Ie* in accordance with *ibid* s 8: see PARA 919 ante.

10 *Ibid* s 19(3).

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#### **924. Lump sum and periodical payments.**

Regulations<sup>1</sup> may make provision, including provision modifying the Social Security (Recovery of Benefits) Act 1997, for any case in which two or more compensation payments<sup>2</sup> in the form of lump sums are made by the same person to or in respect of the injured person<sup>3</sup> in consequence of the same accident, injury or disease<sup>4</sup>. The regulations may (among other things) provide:

- 63 (1) for the recalculation<sup>5</sup> of the amount of any compensation payment;
- 64 (2) for giving credit for amounts already paid; and
- 65 (3) for the payment by any person of any balance or the recovery from any person of any excess<sup>6</sup>.

Regulations may also make provision, including provision modifying the 1997 Act, for any case in which, in final settlement of the injured person's claim, an agreement is entered into for the making of periodical compensation payments<sup>7</sup> (whether of an income or capital nature), or periodical compensation payments and lump sum compensation payments<sup>8</sup>. Regulations so made may (among other things) provide:

- 66 (a) for the relevant period<sup>9</sup> to be treated as ending at a prescribed<sup>10</sup> time;
- 67 (b) for the person who is to make the payments under the agreement to be treated for the purposes of the 1997 Act as if he had made a single compensation payment on a prescribed date<sup>11</sup>.

1 For the meaning of 'regulations' see PARA 904 note 6 ante.

2 For the meaning of 'compensation payment' see PARA 904 note 1 ante.

3 For the meaning of 'the injured person' see PARA 904 ante.

4 Social Security (Recovery of Benefits) Act 1997 s 18(1).

5 In accordance with *ibid* s 8: see PARA 919 ante.

6 *Ibid* s 18(2). For the purposes of s 18(2), the regulations may provide for the gross amounts of the compensation payments to be aggregated and for (1) the aggregate amount to be taken to be the gross amount of the compensation payment for the purposes of s 8; and (2) so much of the aggregate amount as is attributable to a head of compensation listed in s 8(1), Sch 2 col 1 (see PARA 919 note 1 ante) to be taken to be the part of the gross amount which is attributable to that head, and for the amount of any recoverable benefit shown against any head in Sch 2 col 2 to be taken to be the amount determined in accordance with the most recent certificate of recoverable benefits: s 18(3). As to the regulations made see note 11 *infra*.

7 A periodical payment may be a compensation payment for these purposes even though it is a small payment (see PARA 904 note 6 ante): s 18(6).

8 *Ibid* s 18(4).

9 For the meaning of 'the relevant period' see PARA 904 note 3 ante.

10 For the meaning of 'prescribed' see PARA 904 note 6 ante.

11 Social Security (Recovery of Benefits) Act 1997 s 18(5). The following provisions apply where a compensation payment in the form of a lump sum (an 'earlier payment') has been made to or in respect of the

injured person and subsequently another such payment (a 'later payment') is made to or in respect of the same injured person in consequence of the same accident, injury or disease: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 9(1). In determining the liability under the Social Security (Recovery of Benefits) Act 1997 s 6(1) arising in connection with the making of the later payment, the amount referred to in that subsection must be reduced by any amount paid in satisfaction of that liability as it arose in connection with the earlier payment: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 9(2). Where (1) a payment made in satisfaction of the liability under the Social Security (Recovery of Benefits) Act 1997 s 6(1) arising in connection with an earlier payment is not reflected in the certificate of recoverable benefits in force at the time of a later payment; and (2) in consequence, the aggregate of payments made in satisfaction of the liability exceeds what it would have been had that payment been so reflected, the Secretary of State must pay the compensator who made the later payment an amount equal to the excess: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 9(3). Where a compensator receives a payment under reg 9(3), and the amount of the compensation payment made by him was calculated under the Social Security (Recovery of Benefits) Act 1997 s 8, then the compensation payment must be recalculated under s 8, and the compensator must pay the amount of the increase (if any) to the person to whom the compensation payment was made: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 9(4).

Where both the earlier payment and the later payment are made by the same compensator, he may: (a) aggregate the gross amounts of the payments made by him; (b) calculate what would have been the reduction made under the Social Security (Recovery of Benefits) Act 1997 s 8(3) if that aggregate amount had been paid at the date of the last payment on the basis that (i) so much of the aggregate amount as is attributable to a head of compensation listed in Sch 2 col 1 must be taken to be the part of the gross amount which is attributable to that head, and (ii) the amount of any recoverable benefits shown against any head in Sch 2 col 2 must be taken to be the amount determined in accordance with the most recent certificate of recoverable benefits; (c) deduct from that reduction calculated under head (b) supra the amount of the reduction under section 8(3) from any earlier payment; and (d) deduct from the latest gross payment the net reduction calculated under head (c) supra; and accordingly the latest payment may be nil: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 9(5).

Where the Secretary of State is making a refund under reg 9(3), he must send to the compensator (with the refund) and to the person to whom the compensation payment was made a statement showing the total amount that has already been paid by that compensator to the Secretary of State, the amount that ought to have been paid by that compensator and the amount to be repaid to that compensator by the Secretary of State: reg 9(6). Where the reduction of a compensation payment is recalculated by virtue of reg 9(4) or (5), the compensator must give notice of the calculation to the injured person: reg 9(7).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(iii) Deductions/B. RECOVERY OF SOCIAL SECURITY BENEFITS/(F) Complex Cases/925. Structured settlements.

## 925. Structured settlements.

The following provisions apply where in final settlement of an injured person's<sup>1</sup> claim, an agreement is entered into for the making of periodical payments (whether of an income or capital nature) or for the making of such payments and lump sum payments, and those payments would otherwise fall to be treated for the purposes of the Social Security (Recovery of Benefits) Act 1997 as compensation payments<sup>2</sup>. In those circumstances, the provisions of the 1997 Act and of the Social Security (Recovery of Benefits) Regulations 1997<sup>3</sup> are modified in the following way:

- 68 (1) the compensator in question must be taken to have made on that day a single compensation payment;
- 69 (2) the relevant period<sup>4</sup> in the case of the compensator in question must be taken to end (if it has not done so already) on the day of settlement<sup>5</sup>;
- 70 (3) payments under the agreement referred to above must be taken not to be compensation payments; and
- 71 (4) certain adjustment provisions<sup>6</sup> do not apply<sup>7</sup>.

Where any further payment falls to be made to or in respect of the injured person otherwise than under the agreement in question, heads (1) to (4) above must be disregarded for the purpose of determining the end of the relevant period in relation to that further payment<sup>8</sup>.

In any case where:

- 72 (a) the person making the periodical payments ('the secondary party') does so in pursuance of arrangements entered into with another ('the primary party') (as in a case where the primary party purchases an annuity for the injured person from the secondary party); and
- 73 (b) apart from those arrangements, the primary party would have been regarded as the compensator,

then for the purposes of the 1997 Act, the primary party must be regarded as the compensator and the secondary party must not be so regarded<sup>9</sup>.

1 For the meaning of 'injured person' see PARA 904 ante.

2 Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 10(1).

3 Ie the provisions of the Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205: see the text and notes 4-9 infra; and PARA 903 et seq ante.

4 For the meaning of 'the relevant period' see PARA 904 note 3 ante.

5 For these purposes, 'the day of settlement' means (1) if the agreement referred to in the text is approved by a court, the day on which that approval is given; and (2) in any other case, the day on which the agreement is entered into: Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205, reg 10(5).

6 Ie ibid reg 11(5), (7): see PARA 913 ante.

7 Ibid reg 10(2).

8 Ibid reg 10(3).

9 Ibid reg 10(4). As to structured settlements see further PARA 931 post.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(iv) Interim Payments/926. Application for interim payments.

## **(iv) Interim Payments**

### **926. Application for interim payments.**

In an action for personal injuries the court may, in certain circumstances, order the defendant<sup>1</sup> to make an interim payment<sup>2</sup> of damages before the proceedings between the parties have been finally determined<sup>3</sup>.

The plaintiff<sup>4</sup> may, at any time after the writ has been served on a defendant<sup>5</sup> and the time limited for him to appear has expired, apply to the court for an order requiring that defendant to make an interim payment<sup>6</sup>, that is to say a payment on account of any damages, debt or other sum (excluding costs) which he may be held liable to pay to or for the benefit of the plaintiff<sup>7</sup>. The application must be made by summons, and must be supported by an affidavit<sup>8</sup>.

1 In proceedings where the Motor Insurers' Bureau has been joined as a defendant, an order for an interim payment is not available: see *Powney v Coxage* (1988) Times, 8 March, CA. There can be no liability on the Motor Insurers' Bureau until it has been established that the plaintiff cannot recover the judgment debt against the other defendants; moreover, the defendant in such proceedings cannot be required to make an interim payment since he is not insured: *Powney v Coxage* supra.

2 Interim awards of damages may now be made in any action for damages, and are not limited to personal injury actions. In practice, their greatest use is in relation to personal injury actions: see generally *Structured Settlements and Interim and Provisional Damages* (Law Com no 224) (1994). See also CIVIL PROCEDURE.

3 Rules of court may be made enabling the court in which any proceedings are pending to order a specified interim payment to be made by a party to the proceedings, either by payment to another party or, if the order so provides, by payment into court: see the Supreme Court Act 1981 s 32; and CIVIL PROCEDURE.

'Interim payment', in relation to a party to any proceedings, means a payment on account of any damages, debt or other sum (excluding costs) which that party may be held liable to pay to or for the benefit of another party to the proceedings if a final judgment or order of the court in the proceedings is given or made in favour of that other party: s 32(5). See also RSC Ord 29 r 9; and the text and note 7 infra.

4 For these purposes, any reference to the plaintiff or defendant includes a reference to any person who, for the purpose of the proceedings, acts as next friend to the plaintiff or guardian to the defendant: see RSC Ord 29 r 9.

5 See note 4 supra.

6 RSC Ord 29 r 10(1).

7 RSC Ord 29 r 9. See also note 3 supra.

8 See RSC Ord 29 r 10(2), (3). The affidavit must (1) verify the amount of the damages, debt or other sum to which the application relates and the grounds of the application; (2) exhibit any documentary evidence relied on by the plaintiff in support of the application; and (3) if the plaintiff's claim is made under the Fatal Accidents Act 1976, contain the particulars mentioned in s 2(4) (as substituted): see RSC Ord 29 r 10(3)(a), (b), (c). As to the provisions of the Fatal Accidents Act 1976 see also NEGLIGENCE vol 78 (2010) PARA 24 et seq.

The summons and a copy of the affidavit in support and any documents exhibited to it must be served on the defendant against whom the order is sought not less than ten clear days before the return day: RSC Ord 29 r 10(4).

Notwithstanding the making or refusal of an order for interim payment, a second or subsequent application may be made upon cause shown: Ord 29 r 10(5).

## **UPDATE**

## **926-929 Interim Payments**

RSC and CCR replaced by the Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **926 Application for interim payments**

NOTE 3--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(iv) Interim Payments/927. Conditions for interim payment.

### **927. Conditions for interim payment.**

If, on the hearing of an application for interim payment<sup>1</sup>, the court is satisfied that (1) that the respondent (that is to say, the defendant against whom the order is sought) has admitted liability for the plaintiff's claim; or (2) the plaintiff has obtained judgment against the respondent for damages to be assessed; or (3) if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent, or where there are two or more defendants, against any one of them, the court may, if it thinks fit, order the respondent to make an interim payment of such amount as the court thinks just, not exceeding a reasonable proportion of the damages likely in the court's opinion to be recovered by the plaintiff<sup>2</sup>. In assessing the damages likely to be recovered by the plaintiff, the court must take into account any relevant contributory negligence and any set off, cross-claim or counter claim on which the respondent may be entitled to rely<sup>3</sup>. The court must not, however, make such an order if it appears that the defendant is not a person falling within one of the following categories: (a) a person who is insured in respect of the plaintiff's claim; (b) a public authority; (c) a person whose means and resources are such as to enable him to make the interim payment<sup>4</sup>. An order for an interim payment may be made if conditional leave has been given and the plaintiff could succeed, but it seems that an interim payment cannot be ordered where unconditional leave has been given to defend the action<sup>5</sup>.

Subject to the rule that money recovered by a person under disability is to be dealt with in accordance with the court's directions<sup>6</sup>, the amount of any interim payment ordered to be made is to be paid to the plaintiff unless the order provides for it to be paid into court<sup>7</sup>. The defendant may be ordered to pay by one sum or by instalments<sup>8</sup>.

Where an application is made for an interim payment, the court may give directions as to the further conduct of the action<sup>9</sup>. Once an interim payment has been awarded, the plaintiff cannot discontinue the action without leave of the court or consent of all other parties<sup>10</sup>.

Where, after making an interim payment, a defendant pays a sum of money into court<sup>11</sup>, the notice of payment must state that the defendant has taken into account the interim payment<sup>12</sup>.

<sup>1</sup> See under RSC Ord 29 r 10: see PARA 926 ante. For the meaning of 'interim payment' see PARA 926 note 3 ante.

<sup>2</sup> See RSC Ord 29 r 11(1). In order to obtain an interim payment it is necessary to show that one will succeed against that particular defendant; one cannot obtain an interim payment against either of two defendants by showing that one must succeed against one or other of them: see *Ricci Burns Ltd v Toole* [1989] 3 All ER 478, [1989] 1 WLR 993, CA. In this case it was held that where the plaintiff has a claim for damages against one of two defendants but is unable to show which is responsible until the trial of the action, he cannot obtain an interim payment, because of the interpretation of the words in RSC Ord 29 r 11(1) (see head (3) in the text) 'or where there are two or more defendants against any one of them'. However, this decision has been much criticised and may lead to a change in the wording of Ord 29 r 11.

If the case against all defendants is of the requisite strength, then an interim payment will be awarded against all of them: *Schott Kem Ltd v Bentley* [1991] 1 QB 61, [1990] 3 All ER 850, CA. A defendant may be ordered to make an interim payment notwithstanding the fact that there are other defendants in the action, and he may seek and obtain a contribution or indemnity in respect of it from any other defendant: see RSC Ord 29 r 17(c).

Note that evidence of a payment into court is admissible on an application for an interim payment; the fact of a payment into court is relevant to the assessment of whether, if the action proceeded to trial, the applicant would obtain judgment for substantial damages: *Bowmer and Kirkland Ltd v Wilson Bowden Properties Ltd* (1995) 80 BLR 131.



3 RSC Ord 29 r 11(1). As to interim payment on a counter claim see PARA 929 post. The amount of the interim award is not to be limited to sums for which the plaintiff can show an immediate need: *Schott Kem Ltd v Bentley* [1991] 1 QB 61 at 74, [1990] 3 All ER 850 at 858, CA, per Neill LJ; *Huggair v Eastbourne Hospitals NHS Trust* [1997] CLY 1759. The plaintiff is not required to demonstrate need or hardship, nor is he required to specify how the money will be spent: *Stringman (A Minor) v McArdle* [1994] 1 WLR 1653, CA; *Barton v Saunders* (4 December 1997, unreported). In practice, the purpose for which the interim payment is required should be stated, as the judge may be more likely to be persuaded to exercise the discretion favourably if it is felt that the interim payment is required for a sensible purpose for the benefit of the plaintiff: *Campbell v Mylchreest* [1998] PIQR P20, [1998] 3 CL 212, CA. Where an interim award has been the subject of an appeal, with the result that the money has not been paid pending that appeal, any portion of that interim award which was directed for a specific purpose such as rehabilitation, will not be payable even if the defendant's appeal fails, if the money has not in fact been spent on rehabilitation: *Van Hoffen v Dawson* [1994] PIQR P101, CA.

Where the plaintiff is a minor who will be attaining majority within a few years, a payment into the Court of Protection may be suitable: *Stringman v McArdle (A Minor)* supra.

In some cases where substantial damages are likely to be awarded but quantum is still at large, it may be possible to protect against the possibility that the interim award might turn out to have been too high by requiring a plaintiff who intends to use the payment to purchase a property suited to his post-accident requirements to give an undertaking (1) that the money awarded will be so used; and (2) that he will execute an equitable charge in favour of the defendant to provide the necessary security: *Harris v Ellen* (21 December 1994, unreported), CA.

4 RSC Ord 29 r 11(2). In *Huggair v Eastbourne Hospitals NHS Trust* [1997] CLY 1759 an NHS hospital trust was not permitted to argue that it did not have the resources to enable it to make the interim payment.

5 *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842, [1989] 3 All ER 492, CA; approving *Shanning International Ltd v George Wimpey International Ltd* [1988] 3 All ER 475, [1989] 1 WLR 981, CA. See also *Andrews v Schooling* [1991] 3 All ER 723, [1991] 1 WLR 783, CA. But cf *Ricci Burns Ltd v Toole* [1989] 3 All ER 478, [1989] 1 WLR 993, CA.

6 See RSC Ord 80 r 12; and CIVIL PROCEDURE.

7 See RSC Ord 29 r 13(1). Where the money is paid into court, the court may, on the plaintiff's application, order the whole or any part of it to be paid out to him at such time or times as the court thinks fit: see RSC Ord 29 r 13(1).

8 See RSC Ord 29 r 13(3).

9 See RSC Ord 29 r 14.

10 See RSC Ord 21 r 2(2A).

11 See under RSC Ord 22 r 1: see CIVIL PROCEDURE.

12 RSC Ord 29 r 16.

## UPDATE

### 926-929 Interim Payments

RSC and CCR replaced by the Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 927 Conditions for interim payment

NOTE 2--A judge must take into account the payment's effect on the level playing field factor before the hearing: *Campbell v Mylchreest* [1999] PIQR Q17, CA.

NOTE 3--*Campbell*, cited, which refers to QB decision, affirmed: see NOTE 2. The applicant's insolvency is not taken into account in such an assessment: *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* [2000] All ER (D) 1046.

NOTE 4--RSC Ord 29 r 11 (2)(a) (see head (a) of the text) applies both where liability will be met by an insurance company under the Domestic Regulations Agreement and where it will be met by the Motor Insurer's Bureau: *Sharp v Pereria* [1998] 4 All ER 145, [1998] PIQR Q129, CA.

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**928. Effect of interim payment.**

The fact that an interim payment has been made, whether voluntarily or pursuant to an order of the court, may not be disclosed to the court at the trial or hearing of any question or issue as to liability or damages, until all questions of liability and amount have been determined<sup>1</sup>. Where, upon final determination at trial, the interim payment is found to have been in excess of the damages awarded, the court may order the plaintiff to repay all or part of the interim payment<sup>2</sup>. When ordering repayment of an interim payment, the court may award interest<sup>3</sup>. Where the amount awarded as an interim payment exceeds the special damages in the case, it may then be held to form part of the future damages and will have to be discounted for early receipt<sup>4</sup>.

1 See RSC Ord 29 r 15.

2 See RSC Ord 29 r 17.

3 *Mercers Co v New Hampshire Insurance Co* [1991] 4 All ER 542, [1991] 1 WLR 1173; revsd [1992] 3 All ER 57, [1992] 1 WLR 792, CA.

4 *Bristow v Judd* [1993] PIQR Q 117, CA.

**UPDATE**

**926-929 Interim Payments**

RSC and CCR replaced by the Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(iv) Interim Payments/929. Interim payment on a counterclaim.

**929. Interim payment on a counterclaim.**

A defendant who counterclaims damages in respect of personal injuries to himself or any other person or in respect of a person's death may apply for an order requiring the plaintiff to make an interim payment, and the provisions relating to interim payments<sup>1</sup> apply accordingly with the necessary modifications<sup>2</sup>.

1     Ie RSC Ord 29 rr 9-17: see PARAS 926-928 ante.

2     See RSC Ord 29 r 18.

**UPDATE**

**926-929 Interim Payments**

RSC and CCR replaced by the Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(v) Provisional Damages/930. Provisional damages.

## **(v) Provisional Damages**

### **930. Provisional damages.**

Although the normal rule is that damages are to be assessed as a lump sum<sup>1</sup>, an award of provisional damages may be made in certain circumstances in a personal injuries action<sup>2</sup>. Such an award may be made where there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition<sup>3</sup>.

As regards any such action for damages in which a judgment is given in the High Court, provision may be made by rules of court<sup>4</sup> for enabling the court in certain circumstances to award the injured person: (1) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and (2) further damages at a future date if he develops the disease or suffers the deterioration<sup>5</sup>.

Under the rules of court, a claim for provisional damages must be specifically pleaded, together with the facts on which the party pleading relies<sup>6</sup>. The court may make an award of provisional damages, on such terms as it thinks just, if the plaintiff has pleaded a claim to provisional damages and the court is satisfied that the action is one to which these provisions<sup>7</sup> apply<sup>8</sup>.

An order for provisional damages must specify the disease or type of deterioration in respect of which an application may be made at a future date; it must also, unless the court determines otherwise, specify the period within which such an application is to be made<sup>9</sup>. Damages will be assessed on the basis that the disease or deterioration will not occur, but may include a sum to take account of the plaintiff's fear that there will be such an occurrence<sup>10</sup>. An order will be made only in respect of a clear and severable risk, not a general continuing deterioration<sup>11</sup>.

Where the plaintiff makes an application within the period specified to extend the period, the court may allow it if it thinks it just to do so; in addition the plaintiff may make more than one such application<sup>12</sup>. An order for provisional damages may be made in respect of more than one disease or type of deterioration and may, in respect of each disease or deterioration, specify a different period within which an application may be made at a future date<sup>13</sup>.

The rules relating to default judgments<sup>14</sup> do not apply in relation to an action in which the plaintiff claims provisional damages<sup>15</sup>.

Where a person has been awarded provisional damages and subsequently dies as a result of the act or omission which gave rise to the cause of action for which the damages were awarded, the award of provisional damages does not operate as a bar to an action in respect of that person's death under the Fatal Accidents Act 1976<sup>16</sup>. However, such part (if any) of those provisional damages<sup>17</sup> and any further damages<sup>18</sup> awarded to the person in question before his death as was intended to compensate him for pecuniary loss in a period which in the event falls after his death must be taken into account in assessing the amount of any loss of support suffered by the person or persons for whose benefit the action under the Fatal Accidents Act 1976 is brought<sup>19</sup>.

1 As to the rule that damages are to be assessed as a lump sum see PARA 900 ante.

2 See the Supreme Court Act 1981 s 32A (added by the Administration of Justice Act 1982 s 6(1)). As to interim payments see PARAS 926-929 ante.

3 See the Supreme Court Act 1981 s 32A(1) (as added: see note 2 supra).

4 Any rules made by virtue of this provision may include such incidental, supplementary and consequential provisions as the rule-making authority may consider necessary or expedient: see *ibid* s 32A(3) (as added: see note 2 supra).

5 See *ibid* s 32A(2) (as added: see note 2 supra). Nothing in s 32A (as added) is to be construed as (1) affecting the exercise of any power relating to costs, including any power to make rules of court relating to costs; or (2) prejudicing any duty of the court under any enactment or rule of law to reduce or limit the total damages which would have been recoverable apart from any such duty: s 32A(4) (as so added).

6 See RSC Ord 18 r 8(3). See also *Practice Direction (Provisional Damages Procedure)*[1985] 2 All ER 895, [1985] 1 WLR 961.

7 *Ie* the Supreme Court Act 1981 s 32A (as added: see note 2 supra).

8 RSC Ord 37 r 8(1).

9 See RSC Ord 37 r 8(2); and *Practice Direction (Provisional Damages Procedure)*[1985] 2 All ER 895, [1985] 1 WLR 961. See also *Thurman v Wiltshire and Bath Health Authority* (1997) 36 BMLR 63, where it was acknowledged that the plaintiff's cancer might recur at any time; and it was held that the potential injustice to the plaintiff of imposing an arbitrary time limit significantly outweighed that to the defendants of having no limit notwithstanding the desirability of achieving finality to litigation.

10 *Thurman v Wiltshire and Bath Health Authority* (1997) 36 BMLR 63.

11 *Willson v Ministry of Defence*[1991] 1 All ER 638, [1991] ICR 595. The existence of a chance of disease or deterioration must be measurable rather than fanciful, but even a 2% or 3% chance might in an appropriate case justify an order for provisional damages: *Willson v Ministry of Defence* *supra*. What amounts to serious illness or serious disease in this context is a question of fact: *Willson v Ministry of Defence* *supra*.

12 See RSC Ord 37 r 8(3). No application for further damages may be made after the expiration of the specified period or of such period as extended under Ord 37 r 8(3): Ord 37 r 10(2).

13 See RSC Ord 37 r 8(4). Only one application for further damages may be made in respect of each disease or type of deterioration specified in the order for the award of provisional damages: Ord 37 r 10(6).

14 *Ie* RSC Ord 13 (failure to give notice of intention to defend) and Ord 19 (default of pleadings).

15 See RSC Ord 37 r 8(5).

16 Damages Act 1996 s 3(1), (2). Section 3(2) applies whether the award of provisional damages was made before or after 24 September 1996: s 3(6). As to the provisions of the Fatal Accidents Act 1976 see PARA 932 *et seq post*.

17 For these purposes, 'provisional damages' means damages awarded by virtue of the Supreme Court Act 1981 s 32A (as added) or the County Courts Act 1984 s 51: Damages Act 1996 s 3(5).

18 For these purposes, 'further damages' means damages awarded by virtue of the Supreme Court Act 1981 s 32A(2)(b) (as added) or the County Courts Act 1984 s 51(2)(b): Damages Act 1996 s 3(5).

19 *Ibid* s 3(3). No award of further damages made in respect of that person after his death may include any amount for loss of income in respect of any period after his death: s 3(4). Section 3(3), (4) applies to any award of damages under the Fatal Accidents Act 1976, or, as the case may be, further damages after 24 September 1996: Damages Act 1996 s 3(6).

## UPDATE

### 930 Provisional damages

TEXT AND NOTES--RSC replaced by the Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

NOTES--See *Curi v Colina*(1998) Times, 14 October, CA.

NOTES 2, 3, 7, 17, 18--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 3--See *Chewings v Williams*[2009] EWHC 2490 (QB), [2009] All ER (D) 180 (Aug) (in establishing chance claimant would undergo below-knee amputation, not necessary to prove that he would undergo surgery).

NOTE 16--An agreement by an employer under a provisional consent order to pay interim damages to an employee on a full liability basis precludes the employer from contesting liability in subsequent proceedings brought after the employee's death: *Green v Vickers Defence Systems*(2002) Times, 1 July, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(vi) Structured Settlements/931. Structured settlements.

## (vi) Structured Settlements

### 931. Structured settlements.

A court awarding damages in an action for personal injury<sup>1</sup> may, with the consent of the parties, order that the damages wholly or partly take the form of periodical payments<sup>2</sup>. The parties may agree that compensation should take the form of a structured settlement<sup>3</sup>. A structured settlement is an agreement settling a claim for personal injury on terms whereby damages are to consist wholly or partly of periodical payments<sup>4</sup> and the person to whom the payments are to be made is to receive them as an annuitant under one or more annuities<sup>5</sup> purchased for him by the person against whom the action was brought or, if he is insured against the claim, by his insurer<sup>6</sup>. The payments in question can be for the life of the claimant, or for a specified period, or for a specified or minimum number of payments<sup>7</sup>. The amounts of the periodical payments need not be at a uniform rate or payable at uniform intervals<sup>8</sup> and instead may be specified in the agreement with provision for increases of specified amounts or percentages<sup>9</sup>, or be subject to adjustment in a specified manner so as to preserve their real value<sup>10</sup>, or be partly specified and partly subject to adjustment<sup>11</sup>.

Specific provision has been made for the guarantee by the Crown of settlements by public sector bodies<sup>12</sup>. Where a claim or action for damages for personal injury is settled on terms corresponding to those of a structured settlement except that the person to whom payments are to be made is not to receive them as an annuitant<sup>13</sup>, or where a court awarding damages for personal injury makes an order incorporating such terms<sup>14</sup>, a minister of the crown may guarantee the payments to be made under the agreement or order if it appears to him that the payments are to be made by a body in relation to which he has power to do so<sup>15</sup>.

1 As to the calculation of damages for personal injury see PARA 878 et seq ante.

2 Damages Act 1996 s 2(1). 'The present power to award periodic payments is a dead letter ... the court ought to be given the power of its own motion to make an award for periodic payments rather than a lump sum in appropriate cases': *Wells v Wells*, *Thomas v Brighton Health Authority*, *Page v Sheerness Steel Co plc* [1998] 3 All ER 481 at 502, [1998] 3 WLR 329 at 351, HL, per Lord Steyn.

3 The making of such orders was facilitated by the Damages Act 1996 and by a series of related statutory provisions which simplified the tax position: see the Finance Act 1995 s 142 (repealed) which gave exemption from income tax where an annuity was purchased for or assigned to a person entitled to agreed damages for personal injury. See further *Structured Settlements and Interim and Provisional Damages* (Law Com no 224) (1994).

As from 24 September 1996, structured settlement annuitants have enhanced protection where an annuity has been purchased from an authorised insurance company within the meaning of the Policyholders Protection Act 1975, and that company goes into liquidation. The Policyholders Protection Act 1975 ss 10, 11 (as amended) (protection in the event of liquidation of the insurer) have effect as if any reference to 90% of the amount of the liability, of any future benefit or of the value attributed to the policy were a reference to the full amount of the liability, benefit or value: Damages Act 1996 s 4(1), (5); Policyholders Protection Act 1975 ss 10, 11 (as amended). The same enhanced protection is given in relation to an annuity purchased pursuant to: (1) any order incorporating terms corresponding to those of a structured settlement which a court makes when awarding damages for personal injury (Damages Act 1996 s 4(2)); and (2) terms corresponding to those of a structured settlement contained in an agreement made by the Motor Insurers' Bureau or a Domestic Regulations Insurer in respect of damages for personal injury to be paid in satisfaction of a claim or action against an uninsured driver (s 4(3)). As to the Motor Insurers' Bureau see INSURANCE vol 25 (2003 Reissue) PARA 757 et seq.

4 Ibid s 5(1)(a).



5 The annuity or annuities must provide the claimant with sums which correspond as to amount and time of payment to the periodical payments described in the agreement: *ibid* s 5(4). Payments in respect of the annuity or annuities may be received on behalf of the claimant by another person or received and held on trust for his or her benefit under a trust of which he or she is the sole beneficiary: s 5(5).

Where an agreement is made settling a claim or action for damages for personal injury on terms whereby the damages are to consist wholly or partly of periodical payments and the person against whom the claim or action is brought (or, if he is insured against the claim, his insurer) purchases one or more annuities, and a subsequent agreement is made under which the annuity is, or the annuities are, assigned in favour of the person entitled to the payments (so as to secure that from a future date he receives the payments as the annuitant under the annuity or annuities), then the agreement settling the claim or action shall be treated as a structured settlement and any such annuity assigned in favour of that person is to be treated as an annuity purchased for him pursuant to the settlement: s 5(8).

6 *Ibid* s 5(1)(b). The Lord Chancellor may by an order made by statutory instrument provide that any body specified in the order is to be treated as an insurer if it appears to him to fulfil corresponding functions in relation to damages for personal injury claimed or awarded against persons of any class or description and the reference to a person being insured and his insurer is to be construed accordingly: s 5(6).

7 *Ibid* s 5(2).

8 *Ibid* s 5(3).

9 *Ibid* s 5(3)(a).

10 *Ibid* s 5(3)(b).

11 *Ibid* s 5(3)(c).

12 See *ibid* s 6. This provision was a response to the Law Commission's report *Structured Settlements and Interim and Provisional Damages* (Law Com no 224) (1994), which referred to the problem that many public sector bodies chose not to purchase an annuity to provide the injured person with periodical payments during his or her lifetime, but chose instead to fund such payments from their own resources. This meant that claimants were reluctant to accept structured settlements from public bodies as there was a risk that such bodies could cease to exist without their liabilities being taken over. The Law Commission recommended that such settlements be backed by a government guarantee.

13 Damages Act 1996 s 6(1)(a).

14 *Ibid* s 6(1)(b).

15 *Ibid* s 6(2). The bodies in relation to which a minister may give such a guarantee are such bodies as are designated in relation to the relevant government department by guidelines agreed between that department and the Treasury: s 6(3). However, a guarantee purported to be given by a minister under this provision will not be invalidated by any failure on his or her part to act in accordance with the guidelines: s 6(4). 'Government department' means any department of Her Majesty's government in the United Kingdom and, for the purposes of this provision, a government department is a relevant department in relation to a minister if he or she has responsibilities in respect of that department: s 6(8). For the meaning of 'United Kingdom' see PARA 843 note 3 ante.

A guarantee may be given on such terms as the minister may determine but the terms will in every case require the body in question to reimburse the minister, with interest, for any sums paid by him or her in fulfilment of the guarantee: s 6(5). Any sums required by a minister for fulfilling a guarantee under this provision are to be defrayed out of money provided by Parliament and any sums received by him or her by way of reimbursement are to be paid into the Consolidated Fund: s 6(6). As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711; PARLIAMENT vol 78 (2010) PARA 1028 et seq.

A minister who has given one or more guarantees under this provision must, as soon as possible after the end of each financial year, lay before each House of Parliament a statement showing any outstanding liabilities in respect of guarantees in that year, what sums have been paid in fulfilment of the guarantees and what sums (including interest) have been recovered in that year in respect of the guarantees or are still owing: s 6(7).

## UPDATE

### 931 Structured settlements

TEXT AND NOTES 1, 2--Replaced. Damages Act 1996 s 2 now ss 2, 2A, 2B (substituted by Courts Act 2003 s 100(1)).

A court awarding damages for future pecuniary loss in respect of personal injury may order that the damages are wholly or partly to take the form of periodical payments, and must consider whether to make that order: 1996 Act s 2(1). 'Damages' includes an interim payment which a court orders a defendant to make to a claimant: s 2A(5).

A court awarding other damages in respect of personal injury may, if the parties consent, order that the damages are wholly or partly to take the form of periodical payments: s 2(2). A court may not make an order for periodical payments unless satisfied that the continuity of payment under the order is reasonably secure: s 2(3) (s 2 as so substituted). For this purpose, the continuity of payment under an order is reasonably secure if (1) it is protected by a guarantee given under s 6 or the Schedule, (2) it is protected by a scheme under the Financial Services and Markets Act 2000 s 213 (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 584) (whether or not as modified by the Damages Act 1996 s 4), or (3) the source of payment is a government or health service body: s 2(4). 'Government or health service body' means a body designated as a government body or a health service body by order made by the Lord Chancellor: s 2A(2), (3). See the Damages (Government and Health Service Bodies) Order 2005, SI 2005/474 (amended by SI 2007/2128, SI 2007/3224, SI 2009/2748).

An order for periodical payments may include provision (a) requiring the party responsible for the payments to use a method (selected or to be selected by him) under which the continuity of payment is reasonably secure by virtue of the 1996 Act s 2(4); (b) about how the payments are to be made, if not by a method under which the continuity of payment is reasonably secure by virtue of s 2(4); (c) requiring the party responsible for the payments to take specified action to secure continuity of payment, where continuity is not reasonably secure by virtue of s 2(4); (d) enabling a party to apply for a variation of provision included under head (a), (b) or (c): s 2(5).

Where a person has a right to receive payments under an order for periodical payments, or where an arrangement is entered into in satisfaction of an order which gives a person a right to receive periodical payments, that person's right under the order or arrangement may not be assigned or charged without the approval of the court which made the order; and a court must not approve an assignment or charge unless satisfied that special circumstances make it necessary, and a purported assignment or charge, or agreement to assign or charge, is void unless approved by the court: s 2(6). This is without prejudice to a person's power to assign a right to the scheme manager established under the Financial Services and Markets Act 2000 s 212 (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 583): Damages Act 1996 s 2A(4).

Where an order is made for periodical payments, an alteration of the method by which the payments are made must be treated as a breach of the order (whether or not the method was specified under head (b)) unless (i) the court which made the order declares its satisfaction that the continuity of payment under the new method is reasonably secure, (ii) the new method is protected by a guarantee given under s 6 or the Schedule, (iii) the new method is protected by a scheme under the Financial Services and Markets Act 2000 s 213 (whether or not as modified by the Damages Act 1996 s 4), or (iv) the source of payment under the new method is a government or health service body: s 2(7).

An order for periodical payments must be treated as providing for the amount of payments to vary by reference to the retail prices index (within the meaning of the Income and Corporation Taxes Act 1988 s 833(2) (now the Income Tax Act 2007 s 989)) at such times, and in such a manner, as may be determined by or in accordance

with Civil Procedure Rules, but an order for periodical payments may include provision disapplying this provision or modifying its effect: 1996 Act s 2(8), (9). It may be appropriate to use a measure other than the retail prices index: *Thompstone v Tameside and Glossop Acute Services NHS Trust* [2008] EWCA Civ 5, [2008] 2 All ER 553.

The 1996 Act s 2 is without prejudice to any power otherwise exercisable: s 2A(7).

The Lord Chancellor may by order enable a court which has made an order for periodical payments to vary the order in specified circumstances: see s 2B. See the Damages (Variation of Periodical Payments) Order 2005, SI 2005/841 (amended by SI 2007/1898).

NOTE 2--See *YM v Gloucestershire Hospitals NHS Foundation; Kanu v King's College Hospital Trust* [2006] EWHC 821 (QB), [2006] All ER (D) 187 (Apr) (continuity of payments reasonably secure).

NOTE 3--1996 Act s 4 amended, Policyholders Protection Act 1975 repealed: SI 2001/3649.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(vii) Fatal Accidents/932. Persons entitled to an award of damages as 'dependants'.

## (vii) Fatal Accidents

### 932. Persons entitled to an award of damages as 'dependants'.

Where the defendant's wrongful act, neglect or default has resulted in death, the dependants of the deceased may be entitled to an award of damages<sup>1</sup>. In this context 'dependant' means:

- 74 (1) the wife or husband or former wife or husband of the deceased (in cases where the marriage has been annulled or declared void or where the marriage has been dissolved<sup>2</sup>);
- 75 (2) any person who:
  - 1 (a) was living with the deceased in the same household immediately before the date of the death; and
  - 2 (b) had been living with the deceased in the same household for at least two years before that date; and
  - 3 (c) was living during the whole of that period as the husband or wife of the deceased;
- 2 (3) any parent or other ascendant of the deceased;
- 76 (4) any person who was treated by the deceased as his parent;
- 77 (5) any child or other descendant of the deceased;
- 78 (6) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
- 79 (7) any person who is, or is the issue of, a brother, sister or uncle or aunt of the deceased<sup>3</sup>.
- 80

In deducing any relationship for these purposes, any relationship of affinity is to be treated as a relationship by consanguinity, any relationship of the half blood as a relationship of the whole blood, and the stepchild of any person as his child<sup>4</sup>, and an illegitimate person is to be treated as the legitimate child of his mother and reputed father<sup>5</sup>.

1 See the Fatal Accidents Act 1976 s 1(1) (s 1 substituted by the Administration of Justice Act 1982 s 3(1)); and NEGLIGENCE vol 78 (2010) PARA 25.

2 See the Fatal Accidents Act 1976 s 1(3)(a), (4) (as substituted: see note 1 supra); and NEGLIGENCE vol 78 (2010) PARA 27.

3 See *ibid* s 1(3) (as substituted: see note 1 supra); and NEGLIGENCE vol 78 (2010) PARA 27. The category of dependants entitled to maintain an action under the Fatal Accidents Act 1976 was expanded by the Administration of Justice Act 1982 to include the de facto partner of the deceased. In order to claim under the provision, the claimant must establish that the deceased was 'living' with him (the test to determine whether a person is 'living' at a particular location is whether he kept his personal belongings there: *Pounder v London Underground Ltd* [1995] PIQR P217) and it has been held that a person may be living in more than one place and that short absences will not be fatal to the claim, provided there remained an intention to return: *Pounder v London Underground Ltd* supra.

4 See the Fatal Accidents Act 1976 s 1(5)(a) (as substituted: see note 1 supra).

- 5 See *ibid* s 1(5)(b) (as substituted: see note 1 *supra*).

## **UPDATE**

### **932 Persons entitled to an award of damages as 'dependants'**

TEXT AND NOTES--These provisions now extend to the civil partner of the deceased: Fatal Accidents Act 1976 s 1 (amended by the Civil Partnership Act 2004 s 83). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(vii) Fatal Accidents/933. Entitlement to bring proceedings.

### **933. Entitlement to bring proceedings.**

Where death has been caused by a wrongful act, neglect or default which would have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued may be liable to an action in damages, notwithstanding the death of the injured person<sup>1</sup>. Such an action is for the benefit of the dependants of the deceased<sup>2</sup>. The action must be brought by and in the name of the executor or administrator of the deceased<sup>3</sup>, and the plaintiff in the action must deliver to the defendant full particulars of the persons for whom and on whose behalf the action is brought and of the nature of the claim in respect of which damages are sought to be recovered. All losses flowing directly and naturally from a death resulting from the defendant's negligent act may be included in the assessment of damages, including damages which could, but for the defendant's negligent act, have been recovered from a third party<sup>4</sup>.

The right of the dependants to bring an action will depend on the entitlement of the deceased at the time of death. Where the deceased had settled his claim against the defendant prior to his death, no action will be available to the dependants. However, where there is more than one tortfeasor, and the deceased had reached a settlement with one only of those tortfeasors, any concurrent tortfeasors will not be released from liability by the settlement unless the deceased had been fully compensated for the damage suffered<sup>5</sup>.

If the defendant's wrongful act, neglect or default would have entitled the deceased, had he lived, to maintain an action, an action may be brought for the benefit of the dependants<sup>6</sup>. Where a person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate<sup>7</sup> the damages would be reduced by reason of his contributory negligence<sup>8</sup>, any damages recoverable in an action under the Fatal Accidents Act 1976 will be reduced to a proportionate extent<sup>9</sup>.

1 See the Fatal Accidents Act 1976 s 1(1) (s 1 substituted by the Administration of Justice Act 1982 s 3(1)); and NEGLIGENCE vol 78 (2010) PARA 25.

2 For a list of the persons entitled to claim as 'dependants' see PARA 932 ante.

3 See the Fatal Accidents Act 1976 s 2(1) (s 2 substituted by the Administration of Justice Act 1982 s 3(1)); and NEGLIGENCE vol 78 (2010) PARA 26.

4 *Singh v Aitken* (8 September 1997, unreported) (the plaintiff's husband was seriously injured in a road accident and the claim was accepted by the Motor Insurers' Bureau as unanswerable; however, he died from a heart attack before the claim could be settled or litigated. His condition had been misdiagnosed by the defendant doctors: if properly diagnosed, he would have lived. It was held that the negligent misdiagnosis resulted in the Motor Insurer's Bureau claim being settled for considerably less than would have been the case had he lived, and the defendants were liable for that loss).

5 *Jameson v Central Electricity Generating Board (Babcock Energy Ltd)* [1998] QB 323, [1997] 4 All ER 38, CA. It was held that the defence of accord and satisfaction does not release a concurrent tortfeasor from liability in a claim for damages, and the defence of satisfaction protects a concurrent tortfeasor only where the deceased was fully compensated for the damage suffered. See also *Nunan v Southern Ry* [1924] 1 KB 223, CA, where it was held (prior to the enactment of the Unfair Contract Terms Act 1977: see CONTRACT vol 9(1) (Reissue) PARA 820 et seq) that an agreement between the deceased and the defendant that the latter's liability in negligence would be limited in the event of the deceased's death or injury did not serve to reduce the damages recoverable by the dependants.

6 See the Fatal Accidents Act 1976 s 1 (as substituted: see note 1 supra); and NEGLIGENCE vol 78 (2010) PARAS 25-27.

7 le under the Law Reform (Miscellaneous Provisions) Act 1934: see PARA 876 note 10 ante; and EXECUTORS AND ADMINISTRATORS; NEGLIGENCE vol 78 (2010) PARA 24.

8 le reduced under the Law Reform (Contributory Negligence) Act 1945 s 1(1): see NEGLIGENCE vol 78 (2010) PARA 75.

9 Fatal Accidents Act 1976 s 5 (amended by the Administration of Justice Act 1982 ss 3(2), 75, Sch 9 Pt I).

## **UPDATE**

### **933 Entitlement to bring proceedings**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 9--See *Martin and Brown v Grey* (13 May 1998, unreported), DC.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(vii) Fatal Accidents/934. Dependency claim.

### 934. Dependency claim.

A claim under the Fatal Accidents legislation, other than a bereavement claim<sup>1</sup>, is a claim for loss of dependency as a result of the death of the deceased. Any damages which the deceased would have been entitled to recover in his own right as a result of the defendant's wrongful act must be claimed separately<sup>2</sup>. In addition to falling within the classes of dependants who are entitled to maintain a dependency claim, the claimant must also demonstrate<sup>3</sup> actual dependence on the deceased, either financial<sup>4</sup> or in terms of services provided<sup>5</sup> and that that dependence was of a personal rather than commercial or professional nature<sup>6</sup>. Compensation is recoverable in respect of pecuniary losses only<sup>7</sup> (with the limited exception of bereavement damages). Dependency damages are to be assessed on the basis of the dependency existing prior to the injury which ultimately led to the death of the deceased, not on the basis of the deceased's disabled state between the date of the accident and the date of death<sup>8</sup>.

1 As to bereavement claims see PARA 938 post.

2 An action must be brought on behalf of the estate under the Law Reform (Miscellaneous Provisions) Act 1934 (as to which see PARA 939 post).

3 The claimant is not required to prove on a balance of probabilities that he would have been dependent on the deceased had he lived, merely that there was a 'substantial' (rather than a 'speculative') probability: *Davies v Taylor* [1974] AC 207, [1972] 3 All ER 836, HL.

4 When assessing loss of earnings, and dependency on those earnings, the courts will not disregard even a small chance: see *Mallet v McMonagle* [1970] AC 166 at 176, [1969] 2 All ER 178 at 191, HL, per Lord Diplock. See further PARA 887 ante.

5 *Berry v Humm & Co* [1915] 1 KB 627 (husband entitled to recover damages for the loss of wife's housekeeping services, previously performed gratuitously); *Clay v Pooler* [1982] 3 All ER 570 (wife entitled to recover for the loss of husband's 'handyman' services in the home); *Hay v Hughes* [1975] QB 790, [1975] 1 All ER 257, CA (children entitled to costs representing mother's services, including cost of engaging housekeeper or nanny, even though in fact such a cost was not incurred as this service was provided gratuitously by a relative).

6 *Burgess v Management Committee of the Florence Nightingale Hospital for Gentlemen* [1955] 1 QB 349, [1955] 1 All ER 511 (the plaintiff claimed damages for the death of his wife who was also his professional dancing partner: it was held that the losses flowing from the loss of the wife as a dancing partner were not recoverable).

7 'There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence': *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 617, [1942] 1 All ER 657 at 665, HL, per Lord Wright. 'Damages can be awarded under the Fatal Accidents Acts only in respect of pecuniary loss and not as a solatium for injured feelings': *Hay v Hughes* [1975] QB 790 at 802, [1975] 1 All ER 257 at 261, CA, per Edmund-Davies LJ. However, in *Lewis v Osborne* (28 November 1995, unreported), the court, in awarding damages under the Fatal Accidents Act 1976, was prepared to recognise that the injury suffered by a child through the loss of his mother goes beyond the bare loss of services which could be replaced by employing a housekeeper or nanny and includes a maternal element which is quantifiable in the limited vocabulary of general damages: 40% of the cost of a nanny was awarded between the ages of 16 and 18, despite the fact that a nanny would not realistically be employed for a normal teenage girl. See also *Regan v Williamson* [1976] 2 All ER 241, [1976] 1 WLR 305 where it was held that 'services' is to be given a generous interpretation, with the result that the value of such services may be in some measure expanded, except for the statutory sum recoverable in certain specified cases for bereavement, as to which see the Fatal Accidents Act 1976 s 1A (as added and amended); and PARA 938 post.

8 *Jameson v Central Electricity Generating Board (Babcock Energy Ltd)* [1998] QB 323, [1997] 4 All ER 38, CA.



## UPDATE

### 934 Dependency claim

NOTE 4--In assessing the damages due to the partner of a person killed in an accident, the fact that both the partner and the person killed depended on state benefits as their source of income is irrelevant for the purposes of the question of loss: *Cox v Hockenhull* [1999] 3 All ER 577, [2000] 1 WLR 750, CA.

NOTE 5--A dependency claim ought not to include damages which will not reach the service provider because he does not wish to be paid for his service: *H v S* [2002] EWCA Civ 792, [2002] 3 WLR 1179.

NOTE 6--See *Wolfe v Del Innocenti* [2006] EWHC 2694 (QB), [2006] All ER (D) 359 (Oct) (widow, supported by deceased and playing no active role in their business partnership until after his death, not required to give credit for future financial benefits from business: would not thereby be compensated for loss of dependency on him); *Williams v Welsh Ambulance Services NHS Trust* [2008] EWCA Civ 71, [2008] All ER (D) 221 (Feb) (dependants' making a success of deceased's business irrelevant to assessment of dependency).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(vii) Fatal Accidents/935. Assessment of damages; in general.

### 935. Assessment of damages; in general.

In an action under the Fatal Accidents Act 1976 such damages, other than damages for bereavement<sup>1</sup>, may be awarded as are proportioned to the injury<sup>2</sup> resulting from the death to the dependants<sup>3</sup> respectively<sup>4</sup>. After deducting the costs not recovered from the defendant any amount recovered otherwise than as damages for bereavement must be divided among the dependants in such shares as may be directed<sup>5</sup>.

Money paid into court in satisfaction of a cause of action under the Fatal Accidents Act 1976 may, however, be in one sum without specifying any person's share<sup>6</sup>.

In assessing damages in respect of a person's death in such an action, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death must be disregarded<sup>7</sup>.

Provisional and further damages awarded before a person's death must be taken into account in assessing the amount of any loss of support suffered by a dependant<sup>8</sup>.

1 As to bereavement damages see PARA 938 post.

2 Any reference for these purposes to injury includes any disease and any impairment of a person's physical or mental condition: Fatal Accidents Act 1976 s 1(6) (substituted by the Administration of Justice Act 1982 s 3(1)).

3 As to the persons who may claim as dependants see PARA 932 ante.

4 Fatal Accidents Act 1976 s 3(1) (ss 3, 4 substituted by the Administration of Justice Act 1982 s 3(1)).

5 Fatal Accidents Act 1976 s 3(2) (as substituted: see note 4 supra).

6 Ibid s 3(6) (as substituted: see note 4 supra).

7 Ibid s 4 (as substituted: see note 4 supra); and see *Pidduck v Eastern Scottish Omnibuses Ltd* [1990] 2 All ER 69, [1990] 1 WLR 993, CA (widow's allowance a benefit 'accruing as a result of death'); *Hayden v Hayden* [1992] 4 All ER 681, [1992] 1 WLR 986, CA (services provided by father to child in replacement of dead mother's services not benefits so accruing).

8 See the Damages Act 1996 s 3; and PARA 930 ante.

## UPDATE

### 935 Assessment of damages; in general

NOTE 2--See also *Thomas v Kwik Save Stores Ltd* (2000) Times, 27 June, CA (when assessing an award of damages, the court cannot take into account the claimant's emotional dependency on the deceased).

NOTE 7--See also *H v S* [2002] EWCA Civ 792, [2002] 3 WLR 1179 (care received by infant from previously estranged father was benefit to dead mother's estate: no damages where service provider did not wish to be paid); *McIntyre v Harland & Wolff plc* [2006] EWCA Civ 287, [2006] ICR 1222 (permanent disability payment on death disregarded as paid into estate rather than directly to spouse); *Arnup v MW White Ltd* [2008] EWCA Civ 447, [2008] ICR 1064, [2008] All ER (D) 73 (May) (payments received from death in service benefit scheme to be disregarded when assessing damages).



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(vii) Fatal Accidents/936. Loss of a parent.

### **936. Loss of a parent.**

A child whose parent is killed as a result of the default of the defendant is entitled to an award of damages representing the loss to the child of the parent<sup>1</sup>. Where the child's remaining parent survives and also brings an action in respect of the death, damages will be apportioned between the parent and child or children<sup>2</sup>.

Where a husband and father has been killed, the bulk of the award will be made to the widow<sup>3</sup>. Where both parents have died, the normal approach, in the absence of specific evidence as to the parents' spending, will be to assume that 50% of the family income was spent exclusively on themselves<sup>4</sup>.

1 See the Fatal Accidents Act 1976 s 1(3)(e) (as substituted); and PARA 935 ante.

2 See PARA 935 ante.

3 Prospects of remarriage are no longer to be taken into account: see the Fatal Accidents Act 1976 s 3(3) (as substituted); and PARA 937 post.

4 *Dhaliwal v Personal Representatives of Hunt* [1995] PIQR Q56.

### **UPDATE**

### **936 Loss of a parent**

NOTE 1--See *L (A Child) v Barry May Haulage* [2002] PIQR Q35 (father unable financially support child).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(vii) Fatal Accidents/937. Loss of a spouse or de facto partner.

### **937. Loss of a spouse or de facto partner.**

In an action under the Fatal Accidents Act 1976 where there fall to be assessed damages payable to a widow in respect of the death of her husband, the remarriage of the widow or her prospects of remarriage must not be taken into account<sup>1</sup>. The widower's remarriage prospects should also be ignored<sup>2</sup>.

In such an action where there fall to be assessed damages payable to a person who is a dependant by virtue of having lived as husband and wife with the deceased<sup>3</sup> in respect of the death of the person with whom the dependant was so living, there must be taken into account, together with any other matter that appears to the court to be relevant to the action, the fact that the dependant had no enforceable right to financial support by the deceased as a result of their living together<sup>4</sup>.

1 Fatal Accidents Act 1976 s 3(3) (s 3 substituted by the Administration of Justice Act 1982 s 3(1)).

2 *Stanley v Saddique* [1992] QB 1, [1991] 1 All ER 529, CA; *Topp v London Country Bus (South West) Ltd* [1993] 3 All ER 448, CA; see also the Fatal Accidents Act 1976 s 4 (as substituted) which requires the courts to disregard any benefits accruing to a person's estate as a result of his death; and PARA 935 ante.

3 I.e a person who is a dependant by virtue of *ibid* s 1(3)(b) (as substituted): see PARA 932 ante.

4 *Ibid* s 3(4) (as substituted: see note 1 *supra*).

### **UPDATE**

### **937 Loss of a spouse or de facto partner [or civil partner]**

TEXT AND NOTES 3, 4--Provisions extend to civil partner of deceased: Fatal Accidents Act 1976 s 3(4) (amended by the Civil Partnership Act 2004 s 83(8)).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(vii) Fatal Accidents/938. Bereavement damages and funeral expenses.

### **938. Bereavement damages and funeral expenses.**

An action following death may also consist of or include a claim for damages for bereavement. Such an action is for the benefit of a narrower class of claimants than the dependants previously listed<sup>1</sup>: it may be brought for the benefit of the wife or husband of the deceased and, where the deceased was a minor who was never married, of his parents, if he was legitimate or his mother if he was illegitimate<sup>2</sup>. Where there is a claim for damages for the benefit of both the parents of the deceased, the sum awarded is to be divided equally between them<sup>3</sup>.

Where the deceased was a minor at the time of injury but an adult at the date of death, no bereavement award is to be made<sup>4</sup>. Where the dependants have incurred funeral expenses in respect of the deceased, damages may be awarded in respect of those expenses<sup>5</sup>.

1 As to dependants see PARA 932 ante.

2 See the Fatal Accidents Act 1976 s 1A (added by the Administration of Justice Act 1982 s 3(1)); and NEGLIGENCE vol 78 (2010) PARAS 25-26. The sum currently to be awarded as damages is £7,500, by virtue of the Fatal Accidents Act 1976 s 1A(3) (s 1A as added; s 1A(3) substituted by the Damages for Bereavement (Variation of Sum) (England and Wales) Order 1990, SI 1990/2575). This is applicable to causes of action accruing on or after 1 April 1991, and the sum may be amended by statutory instrument: see the Fatal Accidents Act 1976 s 1A(5) (as so added).

3 See *ibid* s 1A(4) (as added: see note 2 *supra*).

4 *Doleman v Deakin* (1990) Times, 30 January, CA.

5 Fatal Accidents Act 1976 s 3(5) (substituted by the Administration of Justice Act 1982 s 3(1)). Reasonable expenses only may be recovered: this may include a normal tombstone, but not religious mourning expenses after the funeral: *Stanton v Ewart F Youlden Ltd* [1960] 1 All ER 429, [1960] 1 WLR 543.

## **UPDATE**

### **938 Bereavement damages and funeral expenses**

NOTE 2--1976 Act s 1A amended: Civil Partnership Act 2004 s 83(7). The sum to be awarded for causes of action accruing after 1 January 2008 is £11,800: 1976 Act s 1A(3) (amended by the Damages for Bereavement (Variation of Sum) (England and Wales) Order 2007, SI 2007/3489).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(vii) Fatal Accidents/939. Claim on behalf of the estate of the deceased.

**939. Claim on behalf of the estate of the deceased.**

In addition to the claim which may be brought by the dependants of the deceased in respect of their own loss of dependency, a separate claim, founded on the same cause of action, may be brought on behalf of the estate of the deceased. On the death of any person, all causes of action vested in him survive for the benefit of his estate<sup>1</sup>. Such an action will not include damages for loss of income in respect of any period after that person's death<sup>2</sup>.

An award made to the estate for pre-trial loss of earnings will not fall to be deducted from any award made to the dependants under the Fatal Accidents legislation<sup>3</sup>. Provisional and further damages awarded before a person's death must, however, be taken into account in assessing the amount of any loss of support suffered by a dependant<sup>4</sup>.

1 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1) (as amended); and EXECUTORS AND ADMINISTRATORS. A claim for bereavement damages under the Fatal Accidents Act 1976 s 1A (as added) (see PARA 938 ante) does not survive for the benefit of the estate: Law Reform (Miscellaneous Provisions) Act 1934 s 1(1A) (added by the Administration of Justice Act 1982 s 4(1)).

2 Law Reform (Miscellaneous Provisions) Act 1934 s 1(2)(a)(ii) (substituted by the Administration of Justice Act 1982 s 4(2)). Lost income is recoverable by the dependants of the deceased under the Fatal Accidents Act 1976.

3 *Murray v Shuter* [1976] QB 972, [1975] 3 All ER 375, CA.

4 See the Damages Act 1996 s 3; and PARA 930 ante.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/4. MEASURE OF DAMAGES IN TORT/(3) PERSONAL INJURY/(viii) Trespass to the Person/940. Trespass to the person.

## **(viii) Trespass to the Person**

### **940. Trespass to the person.**

Trespass to the person<sup>1</sup>, whether by assault, battery or false imprisonment, is actionable without proof of actual damage. Thus in all cases of trespass nominal damages at least are recoverable, and substantial damages<sup>2</sup> are recoverable for discomfort and inconvenience<sup>3</sup>, or injury to dignity, even where no physical injury is proved. Where physical injury does result from the trespass, the damages will be calculated as in any other action for personal injury.

Damages for emotional shock which does not result in physical illness may, it seems, be recovered where there is other physical injury<sup>4</sup>, and also, it is submitted, in cases where there is no physical injury, as in the case of an assault without any battery, provided it is substantial and not too remote<sup>5</sup>. An award of aggravated damages may be made in an action for trespass to the person, unlike an action in negligence<sup>6</sup>.

Exemplary damages may be awarded in an action for trespass to the person where the trespass falls within one of the three categories in which such damages are generally available<sup>7</sup>.

False imprisonment affects not only someone's liberty but also his reputation, and the damage continues until stopped by an avowal that the imprisonment was false<sup>8</sup>.

In addition to general damages for any physical or mental injury<sup>9</sup> which results directly from the trespass, damages for specific pecuniary loss or other consequential damage may be recovered<sup>10</sup>. Provocation does not serve to reduce the damages recoverable by way of compensation for physical injury, though it may negative the award of aggravated or exemplary damages<sup>11</sup>.

1 See generally TORT.

2 As to the award of aggravated damages in tort see PARA 1111 et seq post. As to the distinction between aggravated and exemplary damages see PARA 811 ante.

3 The discomfort or inconvenience must be substantial: see *Bailey v Bullock* [1950] 2 All ER 1167, (1950) 94 Sol Jo 689; approved in *Stedman v Swan's Tours* (1951) 95 Sol Jo 727, CA, per Singleton LJ; cf *Hobbs v London and South Western Rly Co*(1875) LR 10 QB 111 at 122 per Mellor J.

4 *Blake v Midland Rly Co*(1852) 18 QB 93 at 111 per Coleridge J.

5 See *Hambrook v Stokes Bros*[1925] 1 KB 141 at 156, CA, per Atkin LJ. Cf as to liability for emotional shock where the claim is based on negligence: *Hay (or Bourhill) v Young*[1943] AC 92 at 103, [1942] 2 All ER 396 at 402, HL, per Lord Macmillan; *Alcock v Chief Constable of the South Yorkshire Police* [1992] 1 AC 310, [1991] 4 All ER 907, HL; *Page v Smith* [1996] 1 AC 155, [1995] 4 All ER 522, HL; *King v Phillips*[1953] 1 QB 429 at 433, [1953] 1 All ER 617 at 618, CA, per Singleton LJ, and at 440 and at 623 per Denning LJ, who stated that in a claim in negligence, whether the exemption of damages for shock is based on want of duty or on remoteness, the test of liability is foreseeability of injury by shock.

6 *W v Meah*[1986] 1 All ER 935, (1985) 136 WLJ 165; *Appleton v Garrett* [1996] PIQR P1, (1995) 34 BMLR 23 (plaintiffs subjected to unnecessary dental treatment by defendant dentist; aggravated damages calculated as 15% of the sum awarded for pain and suffering and loss of amenity: see PARA 1114 post).

7 *White v Metropolitan Police Comr* (1982) Times, 24 April; *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL.



8 *Hook v Cunard Steamship Co Ltd*[1953] 1 All ER 1021, [1953] 1 WLR 682; following *Walter v Alltools Ltd* (1944) 171 LT 371, CA. See also *Associated Newspapers v Dingle*[1964] AC 371, [1962] 2 All ER 737, HL (the fact judge exculpates plaintiff may not result in a reduction in damages). As to damages for miscalculated extra time in prison see *Evans v Governor of Brockhill Prison* [1997] CLY 4856 (with serious criminal record no damages for humiliation or loss of reputation but substantial damages for unjustified extra time).

9 As to emotional ('nervous') shock see NEGLIGENCE vol 78 (2010) PARA 12.

10 See *Childs v Lewis* (1924) 40 TLR 870 (loss of directorship following false larceny charge); cf *Harnett v Bond*[1925] AC 669, HL (detention of sane man as lunatic). Loss of her husband by a female plaintiff may be a consequential damage resulting from physical injury: see *Lampert v Eastern National Omnibus Co Ltd*[1954] 2 All ER 719n, [1954] 1 WLR 1047. See also *Harris v Harris* [1973] 1 Lloyd's Rep 445, CA; *Housecroft v Burnett*[1986] 1 All ER 332, CA. A person who suffered a personality change as a result of the defendant's negligence may not recover an indemnity against damages he was required to pay to victims of his violent crimes: *Meah v McCremer (No 2)*[1986] 1 All ER 943.

11 'Provocation by the plaintiff can properly be used to take away any element of aggravation, but not to reduce the real damages': *Lane v Holloway*[1968] 1 QB 379 at 387, [1967] 3 All ER 129 at 132, CA. 'When considering what damages a plaintiff is entitled to as compensation for physical injury, the fact that the plaintiff may have behaved badly is irrelevant': *Lane v Holloway* supra at 392 and 134-135 per Salmon LJ. In that case no exemplary damages were claimed or awarded. See also *Gray v Barr*[1971] 2 QB 554, [1971] 2 All ER 949, CA; *Murphy v Culhane*[1977] QB 94, [1976] 3 All ER 533, CA. In *Wasson v Chief Constable Royal Ulster Constabulary* [1987] 8 NIJB 34 and *Barnes v Nayer*(1986) Times, 19 December, CA, it was held that contributory negligence could apply to battery; cf *Horkin v North Melbourne Football Club* [1983] 1 VR 153 (battery). See also *Alliance and Leicester Building Society v Edgestop Ltd*[1994] 2 All ER 38, [1993] 1 WLR 1462, which held that the Law Reform (Contributory Negligence) Act 1945 does not apply to torts to which the defence did not apply prior to its enactment; *Corporacion Nacional del Cobre de Chile v Sogemin Metals Ltd*[1997] 2 All ER 917, [1997] 1 WLR 1396 (nor to conspiracy involving bribery); applying *Horkin v North Melbourne Football Club* supra holding that corresponding local legislation did not apply to assault.

## UPDATE

### 940 Trespass to the person

NOTES--Damages may be recovered for the tort of intentional infliction of harm where an actual psychiatric or bodily injury is suffered: *Wainwright v Home Office*[2003] UKHL 53, [2003] 4 All ER 969.

TEXT AND NOTE 6--In an assault case damages for injury to feelings should be awarded as general rather than aggravated damages: *Richardson v Howie*[2004] EWCA Civ 1127, (2004) Times, 10 September.

NOTES 6, 7--See *AT v Dulghieru*[2009] EWHC 225 (QB), [2009] All ER (D) 194 (Feb) (aggravated and exemplary damages awarded where person held captive and forced to work in a brothel).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(i) Introduction/941. Compensatory function.

## 5. MEASURE OF DAMAGES IN CONTRACT

### (1) GENERAL MEASURE

#### (i) Introduction

##### 941. Compensatory function.

The normal function of damages for breach of contract<sup>1</sup> is compensatory<sup>2</sup>. Damages are awarded, not to punish the party in breach<sup>3</sup>, or to confer a windfall on the innocent party<sup>4</sup>, but to compensate the innocent party and repair his actual loss<sup>5</sup>. Compensation is normally achieved by placing the innocent party in the same position, so far as money can do, as if the contract had been performed<sup>6</sup>. Only in exceptional circumstances do courts depart from this policy and award some greater<sup>7</sup> or lesser<sup>8</sup> sum<sup>9</sup>. Ordinarily there is just one measure of damages in contract, which is the loss truly suffered by the promisee<sup>10</sup>.

1 As in tort, 'the general rule in English law today as to the measure of damages recoverable for the invasion of a legal right, whether by breach of a contract or by commission of a tort, is that damages are compensatory. Their function is to put the person whose right has been invaded in the same position as if it had been respected so far as the award of a sum of money can do so': see *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero*[1977] AC 774 at 841, [1976] 3 All ER 129 at 132, HL, per Lord Diplock. See also *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd*[1952] 2 QB 246 at 253, [1952] 1 All ER 796, at 800, CA, obiter per Denning LJ; *BBMB Finance (Hong Kong) Ltd v Eda Holdings*[1991] 2 All ER 129 at 131, [1990] 1 WLR 409 at 412, PC. In contract, the action for damages is available as of right once breach is shown and, where no loss is shown, nominal damages are awarded: see PARA 813 ante. A contract is not an agreement to pay damages on breach: *Grein v Imperial Airways Ltd*[1937] 1 KB 50 at 69, [1936] 2 All ER 1258 at 1274, CA, per Greer LJ; *Photo Productions Ltd v Securicor Transport Ltd*[1980] AC 827 at 849, [1980] 1 All ER 556 at 556-557, HL, per Lord Diplock. As to damages in tort see PARA 851 et seq ante; and as to damages in bailment see PARA 1088 et seq post. As to tort generally see TORT.

2 *Wertheim v Chicoutimi Pulp Co*[1911] AC 301 at 307, PC; *Chaplin v Hicks*[1911] 2 KB 786 at 794, CA, per Fletcher Moulton LJ; *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd*[1912] AC 673 at 689, HL, per Viscount Haldane LC; *Watts & Co Ltd v Mitsui & Co Ltd*[1917] AC 227 at 241, HL, per Lord Dunedin; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*[1949] 2 KB 528 at 539, [1949] 1 All ER 997 at 1002, CA, per Asquith LJ; *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*[1952] 2 QB 246 at 253, [1952] 1 All ER 796 at 800, CA, per Denning LJ; *Koufos v C Czarnikow Ltd*[1969] 1 AC 350 at 420, sub nom *Koufos v C Czarnikow Ltd, The Heron II*[1967] 3 All ER 686 at 714, HL, per Lord Upjohn; *Tito v Waddell (No 2)*[1977] Ch 106 at 332, [1977] 3 All ER 129 at 316-317 per Megarry VC; *Johnson v Agnew*[1980] AC 367 at 400, [1979] 1 All ER 883 at 896, HL, per Lord Wilberforce; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*[1994] 1 AC 85 at 110, [1993] 3 All ER 417 at 433, HL, per Lord Browne-Wilkinson; *Surrey County Council v Bredero Homes Ltd*[1993] 3 All ER 705 at 709-710, [1993] 1 WLR 1361 at 1364, CA, per Dillon LJ; *Darlington Borough Council v Wiltshier Northern Ltd*[1995] 3 All ER 895 at 900, [1995] 1 WLR 68 at 73, CA, per Dillon LJ; *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] NLJR 1504, (1995) Times, 21 July, CA; *Ruxley Electronics & Construction Ltd v Forsyth*[1996] AC 344, [1995] 3 All ER 268, HL; *A-G v Blake (Jonathan Cape)*[1998] 1 All ER 833 at 844, [1998] 2 WLR 805 at 816-817, CA, obiter per Lord Woolf MR; *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA. See further *Robinson v Harman*(1848) 1 Exch 850 at 855 per Parke B; *France v Gaudet*(1871) LR 6 QB 199; *Bain v Fothergill*(1874) LR 7 HL 158 at 207 per Lord Chelmsford (as to this decision see PARA 1059 note 8 post); *Abrahams v Herbert Reisch Ltd*[1922] 1 KB 477 at 480, CA, per Bankes LJ; *Banco de Portugal v Waterlow & Sons Ltd*[1932] AC 452 at 474, HL, per Viscount Sankey; *Monarch Steamship Co Ltd v Karlshamns Oljefabriker AB*[1949] AC 196 at 221, [1949] 1 All ER 1 at 12, HL, per Lord Wright. See also Beale 'Damages For Poor Service' (1996) 112 LQR 205.

3 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 353, [1995] 3 All ER 268 at 270, HL, per Lord Bridge; *Addis v Gramophone Co Ltd*[1909] AC 488 at 495, HL, per Lord Atkinson, who cited three well known exceptions to the general rule that damages are compensatory: (1) actions against a banker for refusing

to pay a customer's cheque when the banker had sufficient funds of the customer in hand to pay it (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 832); (2) actions involving the sale of land where the vendor fails to make title (see PARA 1059 post; and SALE OF LAND); and (3) actions for breach of promise to marry (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW). Lord Atkinson referred additionally to the possibility of an award of exemplary or vindictive damages (now preferably designated punitive damages) in an action in tort (see PARAS 1115-1117 post). These are not available in contract. For further exceptions see PARA 1002 et seq post. A similar policy to that which denies any punitive function to the law of damages in contract underlies the equitable rule against penalties: see PARAS 1065-1087 post.

4 *Ruxley Electronics & Construction Ltd v Forsyth*[1996] AC 344 at 357, [1995] 3 All ER 268 at 274, HL, per Lord Jauncey of Tullichettle. Consistently with this, the principle in *British Transport Commission v Gourley*[1956] AC 185, [1955] 3 All ER 796, HL (see PARA 901 ante) (sanctioning a deduction of tax liability from personal injury damages where the gross sum would have been taxable in the hands of the claimant) applies to actions for breach of contract, such as where the claim is for wrongful dismissal: see *Beach v Reed Corrugated Cases Ltd*[1956] 2 All ER 652, [1956] 1 WLR 807; *Re Houghton Main Colliery Co Ltd* [1956] 3 All ER 300, [1956] 1 WLR 1219; *Phipps v Orthodox Unit Trusts Ltd*[1958] 1 QB 314, [1957] 3 All ER 305, CA; *Parsons v BNM Laboratories Ltd*[1964] 1 QB 95, [1963] 2 All ER 658, CA. See also *Lyndale Fashion Manufacturers v Rich*[1973] 1 All ER 33, [1973] 1 WLR 73 (damages in respect of salesman's loss of commission, following wrongful termination of his engagement); Coote 'Contract Damages: 'Ruxley' and the Performance Interest' [1997] CLJ 537 at 547-548; cf *Diamond v Campbell Jones*[1961] Ch 22.

5 *Addis v Gramophone Co Ltd*[1909] AC 488 at 494, HL, per Lord Atkinson; *Ruxley Electronics & Construction Ltd v Forsyth*[1996] AC 344 at 366-367, [1995] 3 All ER 268 at 282-283, HL, per Lord Lloyd of Berwick; *A-G v Blake (Jonathan Cape)*[1998] 1 All ER 833 at 844, [1998] 2 WLR 805 at 816-817, CA, obiter per Lord Woolf MR. See also *Jaggard v Sawyer*[1995] 2 All ER 189 at 196-197, [1995] 1 WLR 269 at 276-277, CA, per Sir Thomas Bingham MR (damages at common law affording 'retrospective compensation for past wrongs'); cf *Cory v Thames Ironworks Co*(1868) LR 3 QB 181 (see PARA 1033 post) for a situation where losses not actually suffered, but which would have been a natural and probable consequence of the breach, were held to constitute the awardable measure of damages. In quantifying loss, as in identifying the basis on which damages are to be assessed, the claimant's overall position is taken into account: *Geogas SA v Trammo Gas Ltd, The Baleares* [1990] 2 Lloyd's Rep 130. This may involve taking into account damages already recovered by the claimant in respect of the same matter from someone other than the defendant in the instant proceedings: see PARA 826 ante.

6 'The rule in common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed': *Robinson v Harman*(1848) 1 Exch 850 at 855 per Parke B; *Addis v Gramophone Co Ltd*[1909] AC 488 at 494, HL, per Lord Atkinson; *Wertheim v Chicoutimi Pulp Co*[1911] AC 301 at 307, PC; *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Ry Co of London Ltd*[1912] AC 673 at 689, HL, per Viscount Haldane LC; *Johnson v Agnew*[1980] AC 367 at 400, [1979] 1 All ER 883 at 896, HL, per Lord Wilberforce; *Ruxley Electronics & Construction Ltd v Forsyth*[1996] AC 344 at 355, [1995] 3 All ER 268 at 272, HL, per Lord Jauncey of Tullichettle, and at 365-366 and 281-282 per Lord Lloyd of Berwick.

7 Eg the gain (or saving in costs) which a contract breaker derives from the breach, rather than the innocent party's loss (*A-G v Blake (Jonathan Cape)*[1998] 1 All ER 833 at 844, [1998] 2 WLR 805 at 816-817, CA, obiter per Lord Woolf MR; see also *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*[1974] 2 All ER 321, [1974] 1 WLR 798; and PARAS 999-1000 post); or the full cost to the innocent party of acquiring premises or chattels superior to those injured by the breach, with no allowance for betterment (*Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246, [1989] 1 EGLR 164, CA; paras 983-984 post). Aggravated damages (now preferably designated damages for mental distress) are best regarded as compensatory: see generally *Aggravated, Exemplary and Restitutionary Damages* (Law Com no 247) (1997); and PARAS 811 ante, 1111 post.

8 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd*[1952] 2 QB 246 at 253, [1952] 1 All ER 796 at 800, CA, obiter per Denning LJ (where alleged damage too remote). As to remoteness of damage see PARAS 1015-1034 post. The inability of an innocent party to recover damages for a loss which is too remote constitutes a standard and general qualification on the recovery of actual loss: 'It is true that on these principles the plaintiff may recover more than an indemnity. English law frequently gives him less than his real loss ... He sometimes recovers more than his real loss ... The rules of English law do not always give exact indemnity': *Slater v Hoyle & Smith Ltd*[1920] 2 KB 11 at 24-25, CA, per Scrutton LJ; and see *Bence Graphics International Ltd v Fasson UK Ltd*[1998] QB 87, [1997] 1 All ER 979, CA; and PARAS 970-973 post. Broadly the same is true of those other general factors which act as a general constraint on the recovery of damages, such as want of causation and failure to mitigate: see PARAS 1035-1044 post. Cf *Ruxley Electronics & Construction Ltd v Forsyth*[1996] AC 344, [1995] 3 All ER 268, HL (where measure of compensation sought by innocent party is unreasonable and out of all proportion to the benefit to be gained from awarding it, that measure will not be awarded).

9 In certain cases, the award of a sum greater than the innocent party's apparent loss has been implicitly reconciled with the compensatory function of damages on the grounds that the sum awarded in fact represents no more than that party's actual loss: see for example paras 1002-1003 post (Lord Griffiths's principle and related authorities) and PARA 1056 post (breach of contract under sales of goods). A party who recovers more than his actual loss in a contract action may be obliged to account to the true bearer or sufferer of the loss (see PARAS 1005-1006 post) and this obligation might be thought to preclude offence to the compensatory principle or the rule against penalties (see PARA 1065 et seq post). Note the distinct principle that, in measuring the innocent party's loss, the damages awarded should be reasonable and should not be out of all proportion to the benefits to be derived from awarding them: see PARA 981 post.

10 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 360, [1995] 3 All ER 268 at 277, HL, per Lord Mustill. See also *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] NLJR 1504, (1995) Times, 21 July, CA (innocent party paying extra for superior version of contractor's service, but receiving only inferior version, suffered no financial loss by reason of the substitution; innocent party could not recover damages measured according to difference in value between the two services); cf Beale 'Damages For Poor Service' (1996) 112 LQR 205; Coote 'Contract Damages: 'Ruxley' and the Performance Interest' [1997] CLJ 537 at 543. Courts acknowledge that exactitude in assessment of loss may be an unattainable goal (*Rodocanachi, Sons & Co v Milburn Bros* (1886) 18 QBD 67 at 78, CA, per Lindley LJ), but the mere difficulty of quantifying loss does not relieve the court of the task (see PARA 833 ante).

## UPDATE

### 941 Compensatory function

NOTES--*A-G v Blake*, cited, affirmed: [2000] 4 All ER 385, [2000] 3 WLR 625, HL (in exceptional cases, the court may require a defendant to account for profit arising from his breach of contract).

NOTE 2--*Alfred McAlpine*, cited, reversed: [2000] 4 All ER 97, HL.

NOTES 5, 6--Where damages might be claimed for the anticipated cost of rectifying a breach of contract, the plaintiff cannot recover on that basis if he abandons any intention to rectify: *One Hundred Old Broad St Ltd v Sidley* [1999] EGCS 65, CA.

NOTE 5--In an action for damages for loss of profit, the judge is entitled, when calculating the risks associated with an enterprise, had it continued, to consider the value put on that enterprise by a willing buyer: *ELO Entertainments Ltd v Grand Metropolitan Retailing Ltd* [1999] 1 All ER (Comm) 472, CA.

An individual shareholder can bring a claim which reflects one initiated by the company against a director for breach of contract but discontinued by reason of the company's insolvency, where the director's breach resulted in the insolvency: *Giles v Rhind* [2002] EWCA Civ 1428, [2002] 4 All ER 977, [2003] 2 WLR 237. Where shares are held in trust by a company director whose breach of trust results in loss, the shareholder can bring a claim for damages as beneficiary under the trust: *Shaker v Al-Bedrawi*, *Shaker v Masry*; *Shaker v Steggles Palmer (a firm)* [2002] EWCA Civ 1452, [2003] Ch 350, [2002] 4 All ER 835.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(i) Introduction/942. Damages in equity.

## 942. Damages in equity.

The measure of damages<sup>1</sup> awarded under Lord Cairns's Act<sup>2</sup> in an action for breach of contract is generally governed by the same rules as the measure at common law<sup>3</sup>. Where, under its statutory jurisdiction<sup>4</sup>, the court awards damages in addition to, or in substitution for, an injunction or decree of specific performance<sup>5</sup>, and the contract breaker is liable in damages at common law<sup>6</sup>, the measure in equity is that which would be given at common law<sup>7</sup>. However, the coincidence of common law and equitable damages is confined to cases on which damages are recoverable for the same cause of action<sup>8</sup>. The recovery of damages in equity is not inhibited where no cause of action exists at common law or where the loss for which equitable damages are sought is not compensable at common law<sup>9</sup>. In either event, damages may be awarded in equity, and they will be awarded independently of the common law measure<sup>10</sup>. It follows that the general parity of common law and equitable damages does not inhibit an award of substantial damages in equity where no such damages would be awarded at common law<sup>11</sup>. Conversely, the availability or otherwise of an equitable remedy is generally immaterial to the recovery at common law of benefits gained or economies made in breach of contract<sup>12</sup>. Whether the innocent party has sought an equitable remedy may, however, affect the date at which damages are to be assessed<sup>13</sup>.

1 As to damages in equity see PARAS 1120-1131 post. See also Jolowicz, 'Damages in Equity - a Study of Lord Cairns's Act' [1975] 34 CLJ 224; cited in *Jaggard v Sawyer* [1995] 2 All ER 189 at 196, [1995] 1 WLR 269 at 276, CA, per Sir Thomas Bingham MR.

2 See PARAS 1120-1122 post.

3 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL; explaining *Wroth v Tyler* [1974] Ch 30; cf *Horsler v Zorro* [1975] Ch 302, [1975] 1 All ER 584; *Dyer v Barnard* (16 April 1991, unreported), CA; *Jaggard v Sawyer* [1995] 2 All ER 189 at 211, [1995] 1 WLR 269 at 290-291, CA, per Millett LJ. It follows from the parallel with damages at common law that damages in equity, like those at common law, are ordinarily compensatory: see *Jaggard v Sawyer* supra and, as to the general principle, para 941 ante. Certain classes of equitable obligation (notably, breach of confidence and breach of fiduciary duty) enable the wronged party to recover the fruits of the breach: see EQUITY vol 16(2) (Reissue) PARAS 854-855. As to damages in equity see generally paras 1120-1131 post; and EQUITY vol 16(2) (Reissue) PARA 628.

4 I.e. under the Supreme Court Act 1981 s 50 (which is the successor to the Chancery Amendment Act 1858 s 2 (Lord Cairns's Act)).

5 The statute is not limited to actions for breach of covenant or breach of contract, but can apply to other actions in respect of any wrongful act: see *Jaggard v Sawyer* [1995] 2 All ER 189 at 205, [1995] 1 WLR 269 at 285, CA, per Millett LJ. As to specific performance generally see SPECIFIC PERFORMANCE.

6 Cf *Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA.

7 See eg *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL, where neither party argued for a different measure. See also *Jaggard v Sawyer* [1995] 2 All ER 189 at 211, [1995] 1 WLR 269 at 290-291, CA, per Millett LJ.

8 *Jaggard v Sawyer* [1995] 2 All ER 189 at 211, [1995] 1 WLR 269 at 290-291, CA, per Millett LJ. Where, therefore, equitable damages are awarded in addition to, or in substitution for an injunction or a decree of specific performance, and the contract breaker is liable in damages for loss compensable at common law, the measurement of compensation in equity for that loss is the common law measure: see PARA 1124 post.

9 *Jaggard v Sawyer* [1995] 2 All ER 189 at 210-211, [1995] 1 WLR 269 at 290, CA, per Millett LJ; explaining *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798; *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 712-713, [1993] 1 WLR 1361 at 1367-1368, CA, per Dillon

LJ. See also *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865, CA (no inquiry as to damages on present facts as no particulars of damage given at trial, and award discretionary in any case); para 1124 post.

10 *Jaggard v Sawyer* [1995] 2 All ER 189 at 211, [1995] 1 WLR 269 at 290-291, CA, per Millett LJ; explaining *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL.

11 *Jaggard v Sawyer* [1995] 2 All ER 189 at 210-212, [1995] 1 WLR 269 at 289-292, CA, per Millett LJ; explaining *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705, [1993] 1 WLR 1361, CA; and approving and explaining *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798.

12 *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 713, [1993] 1 WLR 1361 at 1368, CA, per Dillon LJ. Such recovery is itself exceptional: *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833 at 844, [1998] 2 WLR 805 at 816-817, CA, obiter per Lord Woolf MR.

13 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL. See also PARA 952 post.

## **UPDATE**

### **942 Damages in equity**

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 12--*A-G v Blake*, cited, affirmed: [2000] 4 All ER 385, [2000] 3 WLR 625, HL (Crown could recover profits arising from secret service agent's breach of contract).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(i) Introduction/943. The interests protected.

**943. The interests protected.**

Money awards made in actions for breach of contract may safeguard one or more of three interests of the innocent party, namely (1) the expectation interest; (2) the reliance interest; and (3) the restitutionary interest<sup>1</sup>.

<sup>1</sup> *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 714, [1993] 1 WLR 1361 at 1369, CA, per Steyn LJ (who uses the collective phrase 'award of compensation'); *Jaggard v Sawyer* [1995] 2 All ER 189 at 201-202, [1995] 1 WLR 269 at 281, CA, per Sir Thomas Bingham MR. In the case of the restitutionary interest, the phrase 'award of compensation' may be open to the criticism that it presupposes the compensatory nature of a restitutionary award. See further on this question para 997 post. As to the expectation interest see PARA 944 post; as to the reliance interest see PARA 945 post; and as to the restitutionary interest see PARA 946 post.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(i) Introduction/944. The expectation interest.

#### **944. The expectation interest.**

The law seeks to protect the interest of innocent parties in having their contracts performed<sup>1</sup>. This positive interest is termed the 'expectation interest' and it affords the starting point in an assessment of damages<sup>2</sup>. By safeguarding it, the law aims to put an innocent party in the same financial position<sup>3</sup> as if the contract had been performed<sup>4</sup>.

1 *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 714, [1993] 1 WLR 1361 at 1369, CA, per Steyn LJ; *Jaggard v Sawyer* [1995] 2 All ER 189 at 201-202, [1995] 1 WLR 269 at 281, CA, per Sir Thomas Bingham MR. See generally Fuller and Perdue 'The Reliance Interest in Contract Damages' (1937) 46 Yale LJ 52 at 373; Marc Owen 'Some aspects of the recovery of reliance damages in the law of contract' (1984) OJLS 393.

2 *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 714, [1993] 1 WLR 1361 at 1369, CA, per Steyn LJ; *Jaggard v Sawyer* [1995] 2 All ER 189 at 201-202, [1995] 1 WLR 269 at 281, CA, per Sir Thomas Bingham MR.

3 This is not necessarily the same financial position: *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL. Cf Friedman 'The Performance Interest' (1995) 111 LQR 628; Coote 'Contract Damages: 'Ruxley' and the Performance Interest' [1997] CLJ 537.

4 *Robinson v Harman* (1848) 1 Exch 850 at 855 per Parke B; *Addis v Gramophone Co Ltd* [1909] AC 488 at 494, HL, per Lord Atkinson; *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 714, [1993] 1 WLR 1361 at 1369, CA, per Steyn LJ; *Jaggard v Sawyer* [1995] 2 All ER 189 at 201-202, [1995] 1 WLR 269 at 281, CA, per Sir Thomas Bingham MR; *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 355, [1995] 3 All ER 268 at 272, HL, per Lord Jauncey of Tullichettle, and at 365-366 and 281-282 per Lord Lloyd of Berwick. See generally Fuller and Perdue 'The Reliance Interest in Contract Damages' (1937) 46 Yale LJ 52 at 373. As to the expectation interest see further PARAS 977-986 post.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(i) Introduction/945. The reliance interest.

#### **945. The reliance interest.**

The law also seeks to protect the interest of innocent parties in avoiding wasted outlay under broken contracts<sup>1</sup>. It promotes this aim by compensating such parties for expenses incurred and losses suffered in reliance on the contract<sup>2</sup>. The negative interest thus protected is termed the reliance interest<sup>3</sup>. Recovery under this head is purely at the discretion of the innocent party<sup>4</sup>, who must, however, have a proper reason for declining to pursue damages for loss of the expectation interest<sup>5</sup>, and will have no such reason if he seeks merely to avoid the effects of a bad bargain which would not have recouped his outlay even had it been performed<sup>6</sup>. In certain cases, it appears that awards compensating for expectation and reliance losses may be combined, provided that duplication in recovery is avoided<sup>7</sup>.

1 *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 714, [1993] 1 WLR 1361 at 1369, CA, per Steyn LJ; *Jaggard v Sawyer* [1995] 2 All ER 189 at 201-202, [1995] 1 WLR 269 at 281, CA, per Sir Thomas Bingham MR. See further PARAS 987-996 post.

2 *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 714, [1993] 1 WLR 1361 at 1369, CA, per Steyn LJ; *Jaggard v Sawyer* [1995] 2 All ER 189 at 201-202, [1995] 1 WLR 269 at 281, CA, per Sir Thomas Bingham MR.

3 *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 714, [1993] 1 WLR 1361 at 1369, CA, per Steyn LJ; *Jaggard v Sawyer* [1995] 2 All ER 189 at 201-202, [1995] 1 WLR 269 at 281, CA, per Sir Thomas Bingham MR.

4 See PARA 987 post.

5 Such as the difficulty of reaching an accurate assessment of the expectation interest: see PARA 987 post. As to the expectation interest see PARA 944 ante.

6 See PARA 989 post.

7 See PARAS 991-992 post.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(i) Introduction/946. The restitutionary interest.

#### 946. The restitutionary interest.

A contracting party at whose expense another party has been unjustly enriched may be entitled to reverse that unjust enrichment and compel the other party to disgorge the value of benefits gained<sup>1</sup>. Such rights may derive from the general law of restitution and may arise independently of breach<sup>2</sup>. Where, for example, a party confers by his own performance a benefit on the other party, but the other party does not counter-perform, the performing party may gain restitution for the benefit he has conferred, on grounds of total failure of consideration after discharge of the contract<sup>3</sup>. Restitution may follow whether the cause of the total failure of consideration was a breach of contract by the party enriched<sup>4</sup> or some other event, such as frustration of the contract<sup>5</sup>. On other occasions, restitution will derive exclusively from breach of the contract. Where, for example, a party to a contract makes profits or economies through breach, he may (in exceptional cases)<sup>6</sup> be obliged to surrender those profits, or the value of those economies, to the innocent party<sup>7</sup>. The interest of a contracting party in reversing an unjust enrichment made by the other party at his expense is termed the 'restitutionary interest'<sup>8</sup>. It is conceptually distinct from the expectation interest and from the reliance interest<sup>9</sup>.

1 *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833, [1998] 2 WLR 805, CA. As to unjust enrichment and restitution generally see RESTITUTION.

2 Indeed, they may arise independently of contract, as where money is paid under a mistake of fact (*Barclays Bank Ltd v WJ Simms, Son & Cooke (Southern) Ltd* [1980] QB 677, [1979] 3 All ER 522) or in response to an unlawful public demand (*Woolwich Equitable Building Society v IRC* [1993] AC 70, [1992] 3 All ER 737, HL). This is because the law of restitution is an independent field and not an anomalous branch of the law of contract: *Woolwich Equitable Building Society v IRC* supra; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL. As to restitution see RESTITUTION.

3 *Rowland v Divall* [1923] 2 KB 500, CA; *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912; *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] 1 WLR 574, HL. See also *Giles v Edwards* (1797) 7 Term Rep 181; *Hunt v Silk* (1804) 5 East 449; *Planché v Colburn* (1831) 8 Bing 14; *De Bernardy v Harding* (1853) 8 Exch 822; *Yeoman Credit Ltd v Apps* [1962] 2 QB 508, [1961] 2 All ER 281, CA; *Dillon v Baltic Shipping Co* [1990] 1 Lloyd's Rep 579. Cf *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] NLJR 1504, (1995) Times, 21 July, CA (no total failure of consideration); *DO Ferguson & Associates v M Sohl* (1992) 62 BLR 95, CA (doctrine of failure of consideration arguably wrongly applied; contract price for building work was £32,194, of which £26,738 had been paid prior to the builder's breach; the court valued the work actually done at £22,065 and ordered the repayment of £4,673, being the amount by which the sum paid exceeded that value rather than the full amount that had been paid; it would appear that there was no total failure of consideration in this case as the employer had received part of the consideration; moreover, this observation would apply even if the contract were divisible, as the amount awarded was less than the amount of the last instalment suggesting that performance for at least some part of that last instalment had been received). For claims by a party in breach see *Sumpter v Hedges* [1898] 1 QB 673, CA; *Dies v British and International Mining and Finance Co Ltd* [1939] 1 KB 724; *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912.

4 See eg *Rowland v Divall* [1923] 2 KB 500, CA; *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA.

5 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL.

6 *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833, [1998] 2 WLR 805, CA.

7 *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833, [1998] 2 WLR 805, CA; *Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA. The obligation to make restitution in these circumstances is exceptional, the normal rule being compensation: *A-G v Blake (Jonathan Cape)* supra.

8 Protection of the restitutionary interest may enable an innocent acquirer of goods or services to recover advance payments made by him under a contract which he later terminates by reason of a repudiatory breach. It may also enable an innocent seller to recover goods supplied by him to a buyer who has since repudiated his obligation to pay the price: *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 714, [1993] 1 WLR 1361 at 1369, CA, per Steyn LJ; *Jaggard v Sawyer* [1995] 2 All ER 189 at 201-202, [1995] 1 WLR 269 at 281, CA, per Sir Thomas Bingham MR. Such an award is made only where the innocent party cannot claim the contract price, such as where he has conferred a benefit but is prevented from completing performance owing to the fault of the party in breach (*Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435, Aust HC). For a further limit see *Beale v Taylor* [1967] 3 All ER 253, [1967] 1 WLR 1193 (complete performance by innocent party and corresponding failure to perform by party in breach; payment made by buyer prior to delivery, seller failing to deliver or delivering worthless goods; buyer awarded as damages amount paid less value of any benefit obtained).

9 As to the restitutionary interest see PARAS 997-1000 post. As to the reliance interest see PARA 945 ante. An innocent party is not (as in the case of the reliance interest) debarred from exercising a right of restitution merely on the ground that such a remedy will put him in a better position than that which he would have occupied had the contract been performed: see Treitel *The Law of Contract* (9th Edn, 1995) p 849. See also *Butterworth v Kingsway Motors* [1954] 1 WLR 1286; *Slowey v Lodder* (1900) 20 NZLR 321 (affd sub nom *Lodder v Slowey* [1904] AC 442); *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.

## UPDATE

### 946 The restitutionary interest

NOTE 1--*A-G v Blake*, cited, affirmed on this point: [2000] 4 All ER 385, [2000] 3 WLR 625, HL (Crown could recover profits arising from secret service agent's breach of contract).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(i) Introduction/947. Restitutionary damages.

#### **947. Restitutionary damages.**

Awards made to compel the surrender of profits or economies derived from breach are sometimes termed restitutionary damages<sup>1</sup>. The phrase is however anomalous<sup>2</sup>: damages are conventionally an instrument of compensation and (if they are to be more than nominal<sup>3</sup>) require proof of substantial loss, whereas restitution depends on unjust enrichment and may be made to one who suffers no loss<sup>4</sup>. In fact, the foundations and scope of the principle justifying such awards are obscure and there is controversy as to whether (and in what conditions) money awards which purport to reverse gains derived from breach are properly viewed as damages<sup>5</sup>.

1 *Jaggard v Sawyer* [1995] 2 All ER 189 at 202, CA, per Sir Thomas Bingham MR; cf at 211-212 per Millett LJ. See also Treitel *The Law of Contract* (9th Edn, 1995) p 849. As to restitution see RESTITUTION.

2 *McGregor on Damages* (16th Edn, 1997) PARA 4; cf Beale 'Exceptional Measures of Damages in Contract' in Birks (ed) *Wrongs and Remedies in the Twenty-First Century* (1996) p 217.

3 As to nominal damages see PARA 813 ante.

4 McGregor 'Restitutionary Damages' in Birks (ed) *Wrongs and Remedies in the Twenty-First Century* (1996) p 203.

5 See PARAS 999-1000 post. See also the divergent analyses of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798 in *Jaggard v Sawyer* [1995] 2 All ER 189 at 199-200, [1995] 1 WLR 269 at 279, CA; *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 713, [1993] 1 WLR 1361 at 1369, CA, per Steyn LJ. However, in *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833 at 844, [1998] 2 WLR 805 at 816-817, CA, Lord Woolf MR was clearly of the opinion that these are cases of restitution.

#### **UPDATE**

#### **947 Restitutionary damages**

NOTE 5--*A-G v Blake*, cited, affirmed on this point: [2000] 4 All ER 385, [2000] 3 WLR 625, HL.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(i) Introduction/948. Claims for both outlay and gain.

**948. Claims for both outlay and gain.**

An innocent party cannot ordinarily recover both expectation loss (such as loss of profit) and reliance loss (such as wasted capital expenditure)<sup>1</sup>. He has a choice between the two measures<sup>2</sup> but must, in general, choose one or the other<sup>3</sup>, because a claim for both outlay and prospective gain involves a double counting<sup>4</sup>.

1 *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* [1963-1964] 37 ALJR 289 at 293, Aust HC; cf *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 2 All ER 737, HL.

2 See PARAS 944-945 ante.

3 *Gee v Lancashire and Yorkshire Rly* (1860) 6 H & N 211; *Le Peintur v South Eastern Rly* (1860) 2 LT 170; *Wilson v Lancashire and Yorkshire Rly* (1861) 9 CBNS 632; *Woodger v Great Western Rly* (1867) LR 2 CP 318; *Candy v Midland Rly* (1878) 38 LT 226; *Re Daniel* [1917] 2 Ch 405, 117 LT 472; *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292, [1953] 2 All ER 1257, CA.

4 *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292 at 302-303, [1953] 2 All ER 1257 at 1261-1262, CA, per Sir Raymond Evershed MR; *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* [1963-1964] 37 ALJR 289 at 293, Aust HC. See also PARAS 991-992 post.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(i) Introduction/949. Punitive (exemplary) damages not awardable.

**949. Punitive (exemplary) damages not awardable.**

Punitive damages (also known as exemplary damages)<sup>1</sup> are unavailable in an action for breach of contract<sup>2</sup>. This rule conforms with the general principle that damages for breach of contract are compensatory<sup>3</sup>.

1 See generally para 811 ante.

2 *Perera v Vandiyar* [1953] 1 All ER 1109, [1953] 1 WLR 672, CA; *Paris Oldham & Gijlstra v Staffordshire Building Society* [1988] 2 EGLR 39, CA; *Reed v Madon* [1989] Ch 408, [1989] 2 All ER 431. See also *Addis v Gramophone Co Ltd* [1909] AC 488 at 494, HL, per Lord Atkinson. Recovery may, however, be possible where the claimant can cast his action alternatively in tort: *Lavender v Betts* [1942] 2 All ER 72; *Drane v Evangelou* [1978] 2 All ER 437, [1978] 1 WLR 455, CA; *Guppys (Bridport) v Brookling* (1984) 269 EG 846, 14 HLR 1; *McMillan v Singh* (1984) 17 HLR 120, CA; *Millington v Duffy* (1984) 17 HLR 232, CA; *Ramdath v Daley* (1993) 25 HLR 273, [1993] 1 EGLR 82.

3 *Addis v Gramophone Co Ltd* [1909] AC 488 at 494, HL per Lord Atkinson; *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759 at 768, [1984] 1 WLR 287 at 297, CA, per Lord Griffiths; cf *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 3 All ER 394 at 400-401, [1988] 1 WLR 1406 at 1413-1414, CA, per Nourse LJ. See also PARA 941 ante.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(ii) Date for Assessment of Damages/950. The ordinary principle: date of breach.

## (ii) Date for Assessment of Damages

### 950. The ordinary principle: date of breach.

The normal date for the assessment of damages is the date of breach<sup>1</sup>. That general rule accords with both the compensatory function of damages<sup>2</sup> and the innocent party's duty to mitigate<sup>3</sup>. It governs the normal liability of a vendor<sup>4</sup> or purchaser<sup>5</sup> of land for failure to complete<sup>6</sup>. By statute, it also defines the liability of a buyer who fails to accept and pay for goods<sup>7</sup>.

1 *Miliangos v George Frank (Textiles) Ltd*[1976] AC 443 at 468, [1975] 3 All ER 801 at 813, HL, per Lord Wilberforce; *Johnson v Agnew*[1980] AC 367, [1979] 1 All ER 883, HL; *Dodd Properties (Kent) Ltd v Canterbury City Council*[1980] 1 All ER 928 at 933, [1980] 1 WLR 433 at 450-451, CA, per Megaw LJ; *Dominion Mosaics & Tile Co Ltd v Trafalgar Trucking Co Ltd*[1990] 2 All ER 246 at 252-253, [1989] 1 EGLR 164 at 167, CA, per Taylor LJ; *Aitchison v Gordon Durham & Co Ltd* (30 June 1995, unreported), CA.

2 *Johnson v Agnew*[1980] AC 367, [1979] 1 All ER 883, HL. As to the compensatory function of damages see PARA 941 ante.

3 The later losses occurring after breach may be due to the failure to mitigate on breach: see PARAS 1041-1044 post. However, the duty to mitigate is merely a duty to act reasonably and, consistently with this, an innocent party may be allowed a period after breach in which to decide on his course of action: *C Sharpe & Co Ltd v Nosawa & Co* [1917] 2 KB 814. That naturally puts back the date on which damages are assessed.

4 *Diamond v Campbell-Jones*[1961] Ch 22, [1960] 1 All ER 583.

5 *Janred Properties Ltd v Ente Nazionale Italiano per il Turismo*[1989] 2 All ER 444, CA.

6 This is subject to special circumstances: see *Wroth v Tyler*[1974] Ch 30, [1973] 1 All ER 897; *Johnson v Agnew*[1980] AC 367, [1979] 1 All ER 883, HL.

7 See the Sale of Goods Act 1979 s 50(3); para 1056 post; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 289.

## UPDATE

### 950 The ordinary principle: date of breach

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 1--See *Carbopego-Abastecimento de Combustiveis SA v Amci Export Corp*n[2006] EWHC 72 (Comm), [2006] 1 Lloyd's Rep 736 (breach in form failure to deliver; obligations not terminated by that fact and breach not accepted, so damages not assessed as at that point).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(ii) Date for Assessment of Damages/951. Remedial flexibility; date other than breach.

### 951. Remedial flexibility; date other than breach.

In contract (as in tort<sup>1</sup>) the date of wrongdoing is merely a starting principle for the assessment of damages and is not an immutable rule<sup>2</sup>. It yields where the adoption of a later date is necessary to compensate the claimant and do substantial justice between the parties<sup>3</sup>. That necessity might arise where an innocent party did not know of the breach at the time of its commission, or knew of the breach but was prevented by circumstances beyond his control from taking immediate steps to counter it<sup>4</sup>. In these or similar events, damages may be assessed at such later date as is appropriate in the circumstances<sup>5</sup>. That may be the date when the breach was or could reasonably have been discovered<sup>6</sup>, or the date when the innocent party could reasonably have acted to combat the breach<sup>7</sup>, or some other date between that of breach and judgment<sup>8</sup>, including that of judgment itself<sup>9</sup>. In other cases the proper date might be the date when some equitable remedy (having been reasonably obtained by the innocent party) becomes aborted<sup>10</sup>. However, the timing of the assessment must be consistent with the innocent party's obligation to mitigate his loss<sup>11</sup>.

1 Eg damages for conversion: see eg *IBL Ltd v Coussens* [1991] 2 All ER 133, CA; and PARA 861 ante.

2 *Horsler v Zorro* [1975] Ch 302 at 316, [1975] 1 All ER 584 at 595-596 per Megarry J; *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL; *Aitchison v Gordon Durham & Co Ltd* (30 June 1995, unreported), CA.

3 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL.

4 In either case, however, there may be no case for assessment at a later date where the factor in question had no adverse effect on the innocent party's position; cf *Re Bell's Indenture* [1980] 3 All ER 425, [1980] 1 WLR 1217.

5 *Johnson v Agnew* [1980] AC 367 at 400-401, [1979] 1 All ER 883 at 896, HL, per Lord Wilberforce.

6 Eg the time when defective or short goods were delivered (*Van den Hurk v R Martens & Co Ltd* [1920] 1 KB 850) or the time at which a defect in building work became discoverable by the exercise of due diligence: *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] AC 406, [1965] 3 All ER 619, HL. Note that the time of assessment in a building case may affect the very basis of assessment, as where an excusable delay in the discovery of defects makes the cost of reinstatement unreasonable: *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL; and see Treitel *The Law of Contract* (9th Edn, 1995) p 866.

7 Eg the date on which the innocent party, acting reasonably, went into the market to obtain substitute goods for those which were involved in the broken contract (*Ogle v Earl Vane* (1868) LR 3 QB 272, CA) or a reasonable time after buyer-defendant's last request that the seller withhold delivery (*Hickman v Haynes* (1875) LR 10 CP 598, CA). The date of assessment may be put back by a credible assurance on the part of the contract breaker that he will act to remedy the breach (*Barnett v Javerie & Co* [1916] 2 KB 390); or by the innocent party's reasonable pursuit of some equitable remedy (*Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897); or until such time as an innocent party, who has continued to press for performance after the breach, finally terminates (*Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole et Financière SA* [1979] 2 Lloyd's Rep 98; *Aktion Maritime Corp of Liberia v S Kamas & Bros Ltd* [1987] 1 Lloyd's Rep 283).

8 Cf *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897 (house which vendors contracted to sell for £6,000 was worth £7,500 by date fixed for completion and £11,500 at date of judgment; vendors repudiated some three months before completion date; damages awarded in lieu of specific performance and assessed as at the date of judgment because buyers lacked resources to act on their knowledge of breach by going into the market and buying a replacement property; vendors knew of that lack of resources so damage was not too remote; £5,500 awarded). See further *Radford v de Froberville* [1978] 1 All ER 33, [1977] 1 WLR 1262; *Domb v Isoz* [1980] Ch 548, [1980] 1 All ER 942, CA; *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] AC 511, [1985] 1 All ER 120, PC.



9     *Radford v de Froberville* [1978] 1 All ER 33, [1977] 1 WLR 1262; *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897. Cf *IBL Ltd v Coussens* [1991] 2 All ER 133, CA (conversion).

10    See PARA 952 post.

11    *Radford v de Froberville* [1978] 1 All ER 33, [1977] 1 WLR 1262; *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL. As to the duty to mitigate see PARA 1041 post.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(ii) Date for Assessment of Damages/952. Equitable remedies.

### **952. Equitable remedies.**

The availability of equitable remedies may influence the date of assessment of damages for breach of contract<sup>1</sup>. Time spent in seeking such remedies may, for example, delay the point at which it becomes plain that the contract is lost and that damages must be sought<sup>2</sup>. Under a contract for the sale of land, the appropriate date may be (according to circumstances) the date on which specific performance could have been ordered<sup>3</sup>, or the date on which a decree of specific performance obtained by the vendor ceased, without his fault, to be effectively enforceable and the contract became lost<sup>4</sup>. In other cases, the date of judgment may be the proper date<sup>5</sup>.

1 As to equity and damages generally see PARA 942 ante.

2 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL.

3 *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897.

4 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL (failure to complete by purchaser; assumed reasonable for vendors to seek specific performance, which they did; appropriate date for assessment of damages was date when, without vendor's default, that remedy became aborted, ie when mortgagees of the property contracted to sell part of the property pursuant to an earlier order for possession, and not date when decree of specific performance obtained or drawn up and entered, or date when purchaser failed to complete). See generally SALE OF LAND.

5 *Malhotra v Choudhury* [1980] Ch 52, [1979] 1 All ER 186, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(ii) Date for Assessment of Damages/953. Taking account of post-breach facts.

### **953. Taking account of post-breach facts.**

The court may take account of any post-breach event which casts light on the innocent party's loss<sup>1</sup>. Such indicators are particularly relevant where there is no general market enabling loss to be assessed by reference to general factors<sup>2</sup>. Where such general market is lacking, the court should not shut its eyes to those events which actually occurred, for these could provide the best evidence of the true measure of the innocent party's financial expectation from performance<sup>3</sup>. Thus in assessing the damages payable by a builder to his co-developer for the builder's wrongful withdrawal from a joint development agreement, and in seeking to quantify the profit the co-developer would have made had the agreement continued, a judge may properly take account of the site values and costs which were realised in a later agreement made between the builder and a buyer of the site. Such account may be taken even though the form of development which the builder undertook under the later agreement was substantially different from the development which he agreed with co-developer<sup>4</sup>.

<sup>1</sup> *Bwlfa & Merthyr Dare Steam Collieries 1891 Ltd v Pontypridd Water Works Co* [1903] AC 426, HL; *Re Bradberry* [1943] Ch 35; *Aitchison v Gordon Durham & Co Ltd* (30 June 1995, unreported), CA.

<sup>2</sup> Cf *Williams Bros v Ed T Agius Ltd* [1914] AC 510, HL; distinguished in *Aitchison v Gordon Durham & Co Ltd* (30 June 1995, unreported), CA.

<sup>3</sup> *Aitchison v Gordon Durham & Co Ltd* (30 June 1995, unreported), CA, per Russell LJ. Cf *Phillips Hong Kong Ltd v A-G for Hong Kong* (1993) 61 BLR 41, PC (penalties: see PARA 1066 post).

<sup>4</sup> *Aitchison v Gordon Durham & Co Ltd* (30 June 1995, unreported), CA.

### **UPDATE**

### **953 Taking account of post-breach facts**

NOTE 1--The court may also take into account the chance of the occurrence of a future event which would, in the absence of the breach, have the effect of reducing the contractual benefit to the claimant: *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12, [2007] 3 All ER 1 (see PARA 818).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(ii) Date for Assessment of Damages/954. Anticipatory breach; repudiation not accepted.

**954. Anticipatory breach; repudiation not accepted.**

Where the party in breach repudiates the contract before the time fixed for performance<sup>1</sup>, and the innocent party does not accept the repudiation, damages are assessed according to normal principles<sup>2</sup>. The primary point of assessment is therefore the date on which performance was due<sup>3</sup>. If the claimant's loss increases after the date of repudiation that loss is normally recoverable<sup>4</sup>. Again, this conforms with the compensatory role of damages<sup>5</sup>, which protects the innocent party's financial expectation by placing him in the position he would have occupied had the contract been performed<sup>6</sup>.

1 As to repudiation and anticipatory breach see CONTRACT vol 9(1) (Reissue) PARA 997 et seq.

2 See PARA 953 ante. This is, of course, unless subsequent events divest the innocent party of the right to damages.

3 *Tai Hing Cotton Mill v Kamsing Knitting Factory* [1979] AC 91, [1978] 1 All ER 515, PC.

4 *Tredeggar Iron Co v Hawthorn* (1902) 18 TLR 716, CA. No obligation to mitigate applies where the repudiation is not accepted. As to mitigation see PARAS 1041-1044 post.

5 See PARA 941 ante.

6 See *Robinson v Harman* (1848) 1 Exch 850 at 855 per Parke B; and PARA 941 ante.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(ii) Date for Assessment of Damages/955. Anticipatory breach; repudiation accepted.

**955. Anticipatory breach; repudiation accepted.**

Where repudiation occurs before the time fixed for performance and is accepted by the innocent party, damages are assessed according to normal principles<sup>1</sup>, the presumptive time of assessment being the date when performance was due<sup>2</sup>, subject, in this case, to the innocent party's obligation to mitigate<sup>3</sup>. Adopting this time of assessment necessarily makes damages a matter of conjecture where the action is commenced before the date of performance, because the court is obliged to predict what the position would be, had that future date already arrived<sup>4</sup>.

<sup>1</sup> See PARA 953 ante. This is unless, of course, subsequent events divest the innocent party of the right to damages.

<sup>2</sup> *Roper v Johnson* (1873) LR 8 CP 167; *Melachrino v Nickoll* [1920] 1 KB 693.

<sup>3</sup> See *Roper v Johnson* (1873) LR 8 CP; *Roth v Taysen* (1896) 12 TLR 211, CA; *C Sharpe & Co Ltd v Nosawa & Co* [1917] 2 KB 814; *Kaines (UK) Ltd v Österreichische Warenhandels-gesellschaft (formerly CGL Handelsgesellschaft mbH)* [1993] 2 Lloyd's Rep 1, CA. No obligation to mitigate applies where the repudiation is not accepted. As to mitigation see PARAS 1041-1044 post.

<sup>4</sup> Cf the position where charterers commit anticipatory breaches by purporting to cancel charterparties before their right to cancel for non-readiness to load crystallises, but later purport to cancel on the ground of non-readiness to load following the shipowner's affirmation, or following his acceptance of the repudiation: *Fercometal Sail v MSC Mediterranean Shipping Co, The Simona* [1989] AC 788, [1988] 2 All ER 742, HL; *The Mihalis Angelos* [1971] 1 QB 164, [1970] 3 All ER 125, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iii) Alternative Obligations/956. Alternative obligations.

### **(iii) Alternative Obligations**

#### **956. Alternative obligations.**

Where the defendant to a claim for damages for breach of contract might have performed his obligation in more than one way, he is to be presumed for the purpose of calculating damages to have performed it in the way which is least beneficial to the plaintiff<sup>1</sup>. The principle itself is beyond dispute<sup>2</sup> and was well settled in the nineteenth century<sup>3</sup>. A defendant is not bound in damages for not doing that which he is not bound to do<sup>4</sup>. The plaintiff must be content to have the damages assessed by the standard which is least onerous to the defendant<sup>5</sup>. It is not legitimate to inquire as to how the defendant would have performed his contract so as to reward expectations<sup>6</sup>; the question is how he could have performed it and still remained within his legal obligations to the plaintiff<sup>7</sup>. Loss of a chance is relevant when assessing what would have been the value to the plaintiff if the defendant had tendered minimum performance<sup>8</sup>. It is thus only in connection with the possible occurrence of events extraneous to the contract, whether in the control of the defendant or anyone else, that that probability has to be considered<sup>9</sup>.

The principle has been invoked in cases involving the sale or supply of goods, where a seller is bound to supply only the lesser amount or a buyer is bound to accept only the fewest<sup>10</sup>, and in employment cases, where a dismissed employee can recover only those emoluments to which he would have been legally entitled rather than those which he would probably have earned with the addition of bonuses<sup>11</sup> or those to which he would have been entitled to under a pension scheme which the employer was not bound to be continue<sup>12</sup>. Significant cases have concerned the carriage of goods by sea, where damages have been based upon the assumption that the freighter would have chosen the most expensive port for the shipowner to unload at, or a seller to have made use of all the lay days allowable under the charterparty for loading<sup>13</sup>.

Cognate or analogous situations where the principle under discussion does not properly operate should be distinguished. These involve situations where the defendant has a discretion how to perform the contract but not a choice between discrete modes of performance. The defendant must then perform his obligation in a reasonable or proper manner<sup>14</sup>. A defendant may commit a breach of contract in circumstances where he would immediately afterwards have been entitled to terminate the contract lawfully; the plaintiff can recover only nominal damages<sup>15</sup>.

1 The principle is often stated to be that the presumed mode of performance is that which is least profitable to the plaintiff and the least burdensome to the defendant. It has been pointed out that the two halves of the principle can lead to opposite results (see *Paula Lee v Robert Zehill & Co Ltd* [1983] 2 All ER 390 at 393 per Mustill J) and this formulation of the principle is avoided in the text. See further Coote 'Contract Damages: 'Ruxley' and the Performance Interest' [1997] CLJ 537 at 544 et seq.

2 *The World Navigator* [1991] 2 Lloyd's Rep 23 at 32, (1991) Financial Times, April 26, CA, per Staughton LJ. This is now arguably the leading case on alternative obligations and contains useful general discussions on the measure of damages in the context of the earlier cases. Cf *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 104 ALR 1, Aust HC (possible but entirely optional renewal of contract by defendant taken into account in assessing damages based on plaintiff's reliance loss).

3 'Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burdensome to the defendant': *Cockburn v Alexander* (1848) 6 CB 791 at 815 per Maule J (the general principle though was not applicable in that case). Where a person is bound by covenants to do one of two things, and does neither, then in an action by the

covenantee, the measure of damage is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most, beneficial to the covenantee: *Robinson v Robinson* (1851) 1 De GM & G 247 at 257-258 per Lord Cranworth (not a contract case). 'If the contract as there stated is simply in the alternative, to do one of two things, it would be satisfied by the performance of either, and the damages would be the loss occasioned by non-performance of that alternative which would be least beneficial to the plaintiff': *Deverill v Burnell* (1873) LR 8 CP 475 at 480 per Bovill CJ (the majority held that the contract in question was not an 'alternative contract' at all).

4 *Abrahams v Herbert Reisch Ltd* [1922] 1 KB 477 at 482, CA, per Scrutton LJ and at 483 per Atkin LJ (it was held that the contract was not an alternative contract); *Withers v General Theatre Corp Ltd* [1933] 2 KB 536, CA (the only question on appeal was whether there had been a misdirection to the jury and a new trial was ordered). The latter case has been overruled by *Malik v Bank of Credit and Commerce International SA (in liquidation)* [1998] AC 20, [1997] 3 All ER 1, HL, on a point (damages for loss of an existing reputation) wholly unconnected with alternative obligations. Cf *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 104 ALR 1, Aust HC; approved in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, Aust HC.

5 *Abrahams v Herbert Reisch Ltd* [1922] 1 KB 477 at 480, CA, per Banks LJ.

6 *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 at 294, [1966] 3 All ER 683 at 690, CA, per Diplock LJ; cf *Thomas v Clarke* (1818) 2 Stark 450 (discussed in *Cockburn v Alexander* (1848) 6 CB 791 at 815).

7 See eg *The World Navigator* [1991] 2 Lloyd's Rep 23 at 28-29, (1991) Financial Times, 26 April, CA, per Parker LJ.

8 The distinction has been expressed as that between the identification of the promise and the value of the promise to the plaintiff (*Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 at 295-296, [1966] 3 All ER 683 at 691-692, CA, per Lord Diplock; *Paula Lee Ltd v Robert Zehil & Co Ltd* [1983] 2 All ER 390 at 393-394 per Mustill J); although in *The World Navigator* [1991] 2 Lloyd's Rep 23 at 32, Financial Times, 26 April, Staughton LJ could not see the distinction. See also the discussion of *Lavarack v Woods of Colchester Ltd* in *The World Navigator* supra at 27 per Parker LJ, rejecting Lord Denning's approach (see note 11 infra). As to loss of a chance see *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907, [1995] 1 WLR 1602, CA (the current leading case on the relation between the probability of a past event being the case (which must be proved by a plaintiff on balance and which goes to liability) and the chance of another event being affected by that event (which goes to quantification of loss)); and PARA 962 post.

9 *The World Navigator* [1991] 2 Lloyd's Rep 23 at 33, (1991) Financial Times, 26 April, CA, per Staughton LJ. It must not be considered that an employer could have closed down his business to avoid obligations to employees: see *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 at 295 per Diplock LJ; *Bold v Brough Nicholson & Hall Ltd* [1964] 1 WLR 201. There is a strong probability that a party will act in his own best interests: *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 928, [1995] 1 WLR 1602 at 1623-1624, CA, per Millett LJ. See further PARA 963 post.

10 *Re Thorntott and Fehr* [1921] 1 KB 219, 25 Com Cas 59; *Phoebus D Kyprianou Coy v Wm H Pim Jnr & Co Ltd* [1977] 2 Lloyd's Rep 570 at 581; *Johnson Matthey Bankers Ltd v State Trading Corp of India* [1984] 1 Lloyd's Rep 427.

11 *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 at 287, [1966] 3 All ER 683 at 686, CA, per Lord Denning MR strongly dissenting. See also *Janciuk v Winerite Ltd* [1998] IRLR 63 at 63-64, EAT, per Mr Justice Morison (President) (alleged lost opportunity of disciplinary procedure).

12 *Beach v Reed Corrugated Cases Ltd* [1956] 2 All ER 652, [1956] 1 WLR 807. Cf *Bold v Brough Nicholson and Hall* [1963] 3 All ER 849, [1964] 1 WLR 201, where the dismissed employee was contractually entitled under a pension scheme although the defendant employer was not obliged to continue operating the scheme.

13 *Kaye Steam Navigation Co Ltd v W & R Barnett Ltd* (1932) 48 TLR 440; *Spiliada Maritime Corp v Louis Dreyfus Corp* [1983] Com LR 268; *The World Navigator* [1991] 2 Lloyd's Rep 23, Financial Times, 26 April (overturning Phillips J at first instance).

14 *Abrahams v Herbert Reisch Ltd* [1922] 1 KB 477; *Paula Lee Ltd v Robert Zehil & Co Ltd* [1983] 2 All ER 390; *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] 1 WLR 1438, [1996] 2 BCLC 371, PC.

15 *The Mihalios Angelos* [1971] 1 QB 164, [1970] 3 All ER 125, CA. The result is at odds with that in *Connaught Properties Ltd v Regional Properties Ltd* [1942] 2 KB 314 (a first instance decision).

## UPDATE

### 956 Alternative obligations

NOTE 14--*Lion Nathan*, cited, explained: *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423, CA.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/A. LOSS OF ENJOYMENT, AMENITY ETC/957. Loss of enjoyment, loss of amenity, disappointment, vexation and distress.

#### **(iv) Special Classes of Loss**

##### **A. LOSS OF ENJOYMENT, AMENITY ETC**

##### **957. Loss of enjoyment, loss of amenity, disappointment, vexation and distress.**

Whether damages are recoverable in contract for loss of enjoyment, loss of amenity, disappointment, vexation, distress or similar suffering caused by breach depends on the nature of the contract broken and on whether the innocent party suffers any accompanying physical discomfort or inconvenience<sup>1</sup>. Such damages are awarded only exceptionally and awards are traditionally modest<sup>2</sup>.

<sup>1</sup> *Watts v Morrow*[1991] 4 All ER 937 at 956-957, [1991] 1 WLR 1421 at 1441-1442, CA, per Ralph Gibson LJ, and at 960 and 1445 per Bingham LJ; *Hayes v James & Charles Dodd (a firm)* [1990] 2 All ER 815, CA, per Purchas LJ; approved in *Watts v Morrow* supra at 956 and 1441 by Ralph Gibson LJ, with whom Bingham LJ at 958 and 1444 agreed. See also *Perry v Sidney Phillips & Son*[1982] 1 All ER 1005; on appeal [1982] 1 All ER 1005, [1982] 1 WLR 1297, CA.

<sup>2</sup> *Watts v Morrow*[1991] 4 All ER 937 at 960, [1991] 1 WLR 1421 at 1445, CA, per Bingham LJ, and at 958 and 1444 per Ralph Gibson LJ.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/A. LOSS OF ENJOYMENT, AMENITY ETC/958. General principle.

**958. General principle.**

The general rule is that a contract breaker is not liable for distress, frustration, anxiety, displeasure, vexation, tension or aggravation caused to the innocent party by the breach of contract<sup>1</sup>. The rule is one of policy and applies notwithstanding the foreseeability of the distress or other adverse event<sup>2</sup>.

1 *Watts v Morrow* [1991] 4 All ER 937 at 959, [1991] 1 WLR 1421 at 1445, CA, per Bingham LJ.

2 *Watts v Morrow* [1991] 4 All ER 937 at 959, [1991] 1 WLR 1421 at 1445, CA, per Bingham LJ.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/A. LOSS OF ENJOYMENT, AMENITY ETC/959. Accompanying physical discomfort.

**959. Accompanying physical discomfort.**

Where mental suffering is directly related to some physical discomfort or inconvenience caused to the innocent party by the breach<sup>1</sup>, the damages awarded can include a sum to reflect that suffering<sup>2</sup>. The ordinary rules as to remoteness of damage<sup>3</sup>, causation<sup>4</sup> and other limits on recovery<sup>5</sup> apply to such claims, and provided those rules are satisfied the claim ordinarily succeeds<sup>6</sup>, irrespective of the nature or object of the contract<sup>7</sup>.

1 As to causation see PARAS 1035-1040 post.

2 *Hobbs v London and South Western Rly* (1875) LR 10 QB 111; *Bailey v Bullock* [1950] 2 All ER 1167, [1950] WN 482; *Perry v Sidney Phillips & Son* [1982] 1 All ER 1005 (on appeal [1982] 3 All ER 705, [1982] 1 WLR 1297, CA); *Hayes v James & Charles Dodd (a firm)* [1990] 2 All ER 815, CA; *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 1421, CA.

3 As to remoteness of damage see PARAS 1015-1034 post.

4 As to causation see PARAS 1035-1040 post.

5 See PARA 1041 et seq post.

6 *Hayes v James & Charles Dodd (a firm)* [1990] 2 All ER 815, CA; *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 1421, CA.

7 Cf para 960 post; and see *Watts v Morrow* [1991] 4 All ER 937 at 954-956, [1991] 1 WLR 1421 at 1439-1441, CA, per Ralph Gibson LJ.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/A. LOSS OF ENJOYMENT, AMENITY ETC/960. No accompanying physical discomfort.

### 960. No accompanying physical discomfort.

Where loss of enjoyment or distress, although caused by breach of contract, do not directly arise from any physical discomfort or inconvenience caused to the innocent party by that breach<sup>1</sup>, damages are conventionally awarded in contract only where the contract itself<sup>2</sup> was to provide enjoyment, pleasure, peace of mind or relief from stress<sup>3</sup>. Such contracts include contracts to provide holidays<sup>4</sup>, wedding services<sup>5</sup>, private or domestic recreational facilities<sup>6</sup> and entertainments in general, and those where a professional adviser undertakes to relieve a client from such adverse events as harassment by a third party<sup>7</sup>. Where a contract is not to provide pleasure or relief from stress<sup>8</sup>, the mere fact that the mental suffering or disappointment caused by breach was (or should have been) sufficiently within the defendant's contemplation to meet the rules of remoteness of damage<sup>9</sup> does not justify an award<sup>10</sup>. This is because the requirement that the contract be for the provision of pleasure or the relief of stress is a policy constraint applying regardless of the predictability of the adverse event<sup>11</sup>. Claims by parties to commercial contracts, or by parties seeking to acquire goods, land or services for commercial purposes, will not qualify within this limited and exceptional class of case<sup>12</sup>.

1 As to the position where there is accompanying physical discomfort see PARA 959 ante.

2 In a tort case, it is the subject matter of the duty in tort: *Hayes v James & Charles Dodd (a firm)* [1990] 2 All ER 815 at 826, CA, per Purchas LJ; followed in *Watts v Morrow* [1991] 4 All ER 937 at 956, [1991] 1 WLR 1421 at 1441, CA, per Ralph Gibson LJ, with whom Bingham LJ at 958 and 1444 agreed.

3 *Bliss v South East Thames Regional Health Authority* [1987] ICR 700, [1985] IRLR 308, CA; *Hayes v James & Charles Dodd (a firm)* [1990] 2 All ER 815, CA; *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 1421, CA; and see *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL. Controversy surrounds the question as to whether particular classes of consumer contract satisfy the necessary function of being for the conferment of pleasure or relief from stress: see *Knott v Bolton* (24 March 1995, unreported), CA; *Alexander v Rolls Royce Motor Cars Ltd* [1996] RTR 95, CA. Some earlier cases award damages for loss of enjoyment though no evident physical discomfort results from the defendant's breach and the contract is not specifically or predominantly for the provision of pleasure or the relief of stress, for example, where a new car is so defective that the acquirer on hire purchase has his family holiday spoilt by using it: see *Jackson v Chrysler Acceptances Ltd* [1978] RTR 474, CA; but see now *Alexander v Rolls Royce Motor Cars Ltd* supra.

4 *Jarvis v Swan's Tours Ltd* [1973] QB 233, [1973] 1 All ER 71, CA; *Jackson v Horizon Holidays* [1973] 1 All ER 71, [1975] 1 WLR 1468, CA. See also *Victorian Railway Comrs v Coultas* (1888) 13 App Cas 222; *O'Grady v Westminster Scaffolding Ltd* [1962] 2 Lloyd's Rep 238; *Darbishire v Warran* [1963] 3 All ER 310, [1963] 1 WLR 1067, CA; *Heywood v Wellers* [1976] QB 446, [1976] 1 All ER 300, CA; *Ichard v Frangoulis* [1977] 1 All ER 461, [1977] 1 WLR 556; *Jackson v Chrysler Acceptances Ltd* [1978] RTR 474, CA; *Rogers v Parish (Scarborough) Ltd* [1987] QB 933, [1987] 2 All ER 232, CA. See further *Elder and Elder v Koppe* (1974) 15 NSR (2d) 688; *Graham v Voight* (1989) 95 FLR 146; *Mouat v Clark Boyce* [1992] 2 NZLR 559; *Rowlands v Collow* [1992] 1 NZLR 178.

5 *Diesen v Sampson* 1971 SLT 49; *Hardy v Losner Formals* [1997] 1 CL 1749.

6 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL (contract to build swimming pool at private residence of client, broken by failure to construct pool at stipulated depth, was held to be a contract for the 'provision of a pleasurable amenity'; trial judge's award of £2,500 damages for loss of amenity upheld). See PARA 978 post.

7 *Heywood v Wellers* [1976] QB 446, [1976] 1 All ER 300.

8 Cases involving contracts which have failed to qualify include *Alexander v Rolls Royce Motors* [1996] RTR 95 at 100 per Beldam LJ, CA ('breach of contract to repair a motor car, even so prestigious a car as a Rolls Royce, does not give rise to a liability in damages for distress and inconvenience or loss of enjoyment in the use of the car'); cf *Jackson v Chrysler Acceptances Ltd* [1978] RTR 474, CA; *Rogers v Parish (Scarborough) Ltd*

[1987] QB 933, [1987] 2 All ER 232, CA; *Knott v Bolton* (24 March 1995, unreported), CA (contract by architect to design prestigious home); *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 1421, CA (contract to survey condition of house for prospective purchaser; house bought as weekend country property to afford relief from stressful professional life); *Hayes v James & Charles Dodd (a firm)* [1990] 2 All ER 815, CA (erroneous assurance to plaintiff purchasers of commercial garage premises, by their conveyancing solicitors, that right of way existed giving access to rear of premises, causing closure of business after 12 months); *Bliss v South East Thames Regional Health Authority* [1987] ICR 700, [1985] IRLR 308, CA (contract of employment; cf *Addis v Gramophone Co Ltd* [1909] AC 488, HL; *Malik v Bank of Credit and Commerce International SA (in liquidation)* [1998] AC 20, [1997] 3 All ER 1, HL: see PARA 1062 post); *Branchett v Beaney* [1992] 3 All ER 910, CA (held: damages not recoverable for breach of covenant of quiet possession). See also *Dillon v Baltic Shipping Co* [1990] 1 Lloyd's Rep 579; *McConville v Barclays Bank plc* (1993) Times, 30 June; *Firststeel Cold Rolled Products v Anaco* (1994) Times, 21 November; *Reilly v Merseyside Health Authority* (1995) 6 Med LR 246. See generally Palmer and McKendrick (eds) *Interests in Goods* (2nd Edn, 1998) p 867.

9 As to remoteness of damage see PARAS 1015-1034 post. Cf *Hayes v James & Charles Dodd (a firm)* [1990] 2 All ER 815 at 826-827, CA, per Purchas LJ: 'I would approach this special and restricted head of damage rather in the same way as the courts approach the question of pecuniary loss dissociated from physical damage caused by negligence. Damages of that nature are recoverable only when the special relationship between the parties involved demonstrates that the one has in mind liability to pay pecuniary loss and the other relies on that assumption of responsibility'. See also *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686, HL; *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep 555, 120 Sol Jo 401, CA. As to whether liability in contract for particular losses depends on an undertaking to that effect see PARA 1031 post.

10 *Watts v Morrow* [1991] 4 All ER 937 at 959-960, [1991] 1 WLR 1421 at 1445, CA, per Bingham LJ.

11 *Watts v Morrow* [1991] 4 All ER 937 at 959-960, [1991] 1 WLR 1421 at 1445, CA, per Bingham LJ. See also *Hunter v Canary Wharf Ltd* [1997] AC 655 at 707, [1997] 2 All ER 426 at 452-453, HL, per Lord Hoffmann.

12 *Hayes v James & Charles Dodd (a firm)* [1990] 2 All ER 815 at 823, CA, per Staughton LJ.

## UPDATE

### 960 No accompanying physical discomfort

NOTE 3--A contract to survey property for a prospective purchaser can amount to a contract to provide enjoyment, pleasure, peace of mind or relief from stress, when specific instructions refer to matters which relate to the enjoyment of the property, such as aircraft noise: *Farley v Skinner* [2001] UKHL 49, [2001] 4 All ER 801, [2001] 3 WLR 899, overruling *Knott*, cited, reported at (1995) 45 ConLR 127. As to damages awarded for breach of contract involving solicitor's acceptance of instructions from client to prevent removal of her children from United Kingdom, see *Hamilton Jones v David & Snape (a firm)* [2003] EWHC 3147 (Ch), [2004] 1 WLR 924.

NOTE 4--See also *Milner v Carnival plc (t/a Cunard)* [2010] EWCA Civ 389, [2010] All ER (D) 119 (Apr).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/A. LOSS OF ENJOYMENT, AMENITY ETC/961. Modern liberalisation of damages for loss of amenity.

### **961. Modern liberalisation of damages for loss of amenity.**

Recent indications are that awards in contract for loss of amenity may be more liberal than formerly<sup>1</sup>, both as to quantum and even perhaps as to the classes of contract which attract such an award<sup>2</sup>. This liberality may be particularly appropriate in claims by private consumers of goods and services<sup>3</sup>, where an award for loss of amenity offers a sensible and reasonable middle way between an excessive or disproportionate award of damages (such as for reinstatement of an objectively adequate building) and an inadequate or nominal award (such as for vestigial diminution in value)<sup>4</sup>. However, in general terms, awards in contract for loss of amenity are likely to continue to be modest<sup>5</sup>.

1 In so far as the traditional reluctance to award damages for injury to feelings in general contract claims derives from *Addis v Gramophone Co Ltd* [1909] AC 488, HL (no damages for injury to feelings caused by contumelious manner of dismissal of employee), it is to be noted that that decision, while not disapproved, has been held not to preclude an award of damages for injury to reputation and resultant financial loss in an action for breach of the implied term of trust and confidence in an employment contract; and it has been questioned whether the earlier decision fully considered the matter of financial loss arising from the dismissal: see *Malik v Bank of Credit and Commerce International SA (in liquidation)* [1998] AC 20, [1997] 3 All ER 1, HL.

2 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 360-361, [1995] 3 All ER 268 at 275-276, HL, per Lord Mustill, and at 374 and 289-290 per Lord Lloyd of Berwick, who observed that if an emerging atmosphere of clemency to plaintiffs in this area 'involves a further inroad on the rule in *Addis v Gramophone Co Ltd* [1909] AC 488, HL, then so be it'. See also *Hunter v Canary Wharf Ltd* [1997] AC 655 at 696, [1997] 2 All ER 426 at 442, HL, per Lord Lloyd of Berwick, and at 712 and 457 per Lord Cooke of Thorndon (where the observations in *Ruxley Electronics & Construction Ltd v Forsyth* supra were cited with apparent approval). See further *Malik v Bank of Credit and Commerce International SA (in liquidation)* [1998] AC 20, [1997] 3 All ER 1, HL, where it was held that damages for injury to reputation causing financial loss were recoverable in an action for breach of the implied term of trust and confidence in an employment contract, and that the decision in *Addis v Gramophone Co Ltd* supra did not preclude such an award.

3 See eg *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL; and *Hayes v James & Charles Dodd (a firm)* [1990] 2 All ER 815 at 823 per Staughton LJ.

4 See eg *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL. A further ground for liberalising the damages awardable might be the deliberate nature of the wrongdoing: *Hunter v Canary Wharf Ltd* [1997] AC 655 at 705-707, [1997] 2 All ER 426 at 451-452, HL, per Lord Hoffmann. See also *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65.

5 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL; *Watts v Morrow* [1991] 4 All ER 937 at 958, [1991] 1 WLR 1421 at 1444, CA, per Ralph LJ, and at 959-960 and 1445 per Bingham LJ. See also PARA 960 ante.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/B. LOSS OF OPPORTUNITY/962. Loss of opportunity.

## **B. LOSS OF OPPORTUNITY**

### **962. Loss of opportunity.**

Where a breach of contract deprives the innocent party of the chance to receive a particular benefit<sup>1</sup>, or to avoid a particular risk<sup>2</sup>, damages may be awarded for the loss of that chance<sup>3</sup>. The mere fact that damages are hard to assess, or impossible to assess with certainty or precision, does not justify a refusal to award them<sup>4</sup>. Nor is it a defence that the gain of the benefit, or the avoidance of the risk, would have depended on the volition of an independent third party, for such a contingency does not by itself make the assessment of damages impossible<sup>5</sup>. An innocent party who is contractually entitled to belong to a particular class of contestants, and is unlawfully debarred therefrom, can therefore recover for the loss of the chance to succeed at the contest and to gain the promised benefits<sup>6</sup>. An innocent party who, by reason of negligent advice from his professional adviser, is disabled from taking precautions against the incidence of some liability, or denied the chance of inflicting some liability on another, can recover damages to reflect the prospect that the liability would have been avoided or imposed<sup>7</sup>.

1 *Chaplin v Hicks*[1911] 2 KB 786, CA.

2 *Allied Maples Group Ltd v Simmons & Simmons*[1995] 4 All ER 907 at 918, [1995] 1 WLR 1602 at 1613, CA, per Stuart Smith LJ, where he rejected a contention that damages were awardable only for loss of an opportunity to receive some valuable benefit and could detect no difference in principle between the chance of gaining a benefit and the chance of avoiding a liability.

3 *Chaplin v Hicks*[1911] 2 KB 786, CA; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, Aust HC; *Allied Maples Group Ltd v Simmons & Simmons*[1995] 4 All ER 907, [1995] 1 WLR 1602, CA; *Obagi v Stanborough (Developments) Ltd* (7 April 1995, unreported), CA; *Stovold v Barlows (a firm)* [1995] NPC 154, [1996] PNLR 91, CA; *First Interstate Bank of California v Cohen Arnold* [1996] PNLR 17, (1995) Times, 11 November, CA; *Hartle v Laceys (a firm)* (28 February 1997, unreported), CA. The availability of damages is not confined to contracts involving games of chance, sporting contests or other competitions and extends to contracts to provide 'a commercial advantage or opportunity': *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, Aust HC. See also *Fink v Fink* (1946) 74 CLR 127, Aust HC (contract to provide opportunity for reconciliation). The principles which govern this form of damages are essentially the same whether the claim lies in 'contract or tort': *Sellars v Adelaide Petroleum NL* supra; *Doyle v Wallace*(1998) Times, 22 July, CA (personal injury depriving plaintiff of new career opportunity).

4 *Chaplin v Hicks*[1911] 2 KB 786 at 791-792 per Vaughan-Williams LJ, and at 795-796 per Fletcher Moulton LJ, CA; *Fink v Fink* (1946) 74 CLR 127, Aust HC; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, Aust HC. The fact that the prospects of ultimate success may be less than 50% does not mean that they are incapable of objective evaluation: *Allied Maples Group Ltd v Simmons & Simmons*[1995] 4 All ER 907 at 930, [1995] 1 WLR 1602 at 1626, CA, per Millett LJ; *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 104 ALR 1, Aust HC (as cited in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, Aust HC). In *Commonwealth of Australia v Amann Aviation Pty Ltd* supra the prospect of a renewal of the contract between the plaintiff and the defendant, although purely at the defendant's option, was taken into account for the purposes of the principle that a defendant who, in response to a claim for reliance loss, alleges that the plaintiff had made a bad bargain, must prove that the original contract would have been unprofitable to the plaintiff if performed: see PARA 989 post. For criticism of this point see Treitel 'Damages For Breach of Contract in the High Court of Australia' (1992) 108 LQR 226.

5 *Chaplin v Hicks*[1911] 2 KB 786 at 799, CA, per Farwell LJ. In exceptional cases, however, the loss may be so dependent on the unrestricted volition of another person that it is impossible to identify any assessable loss flowing from the breach: *Chaplin v Hicks* supra at 792-793 per Vaughan-Williams LJ.

6 *Chaplin v Hicks*[1911] 2 KB 786, CA. *Sapwell v Bass*[1910] 2 KB 486 and *Watson v Ambergate Nottingham & Boston Rly Co* (1851) 15 Jur 448 must now be read in the light of *Chaplin v Hicks* supra. See also, for earlier decisions, *Richardson v Mellish* (1824) 2 Bing 229; *The Empress of Britain* (1913) 29 TLR 423.

7 *Allied Maples Group Ltd v Simmons & Simmons*[1995] 4 All ER 907, [1995] 1 WLR 1602, CA; followed in *Hartle v Laceys (a firm)* (28 February 1997, unreported), CA; *Stovold v Barlows (a firm)* [1995] NPC 154, [1996] PNLR 91, CA; *First Interstate Bank of California v Cohen Arnold* [1996] PNLR 17, (1995) Times, 11 November, CA. See also *Davies v Taylor*[1974] AC 207, [1972] 3 All ER 836, HL; *Obagi v Stanborough (Developments) Ltd* (7 April 1995, unreported), CA. *Allied Maples Group Ltd v Simmons & Simmons* supra is the leading modern authority on this subject and earlier cases on professional advisers (as indeed on the loss of opportunity generally) must now be read in the light of it: see eg *Barnett v Cohen*[1921] 2 KB 461; *Otter v Church, Adams, Tatham & Co*[1953] 1 Ch 280, [1953] 1 All ER 168; *Hall v Meyrick*[1957] 2 QB 455, [1957] 2 All ER 722, CA; *Kitchin v Royal Air Forces Association*[1958] 2 All ER 241, [1958] 1 WLR 563, CA; *Yardley v Coombes* (1963) 107 Sol Jo 575; *McGrath v Kiely and Powell*[1965] IR 497; *Cook v Swinfen*[1967] 1 All ER 299, [1967] 1 WLR 457, CA; (handling of litigation); *Malyon v Lawrence Messer & Co* [1968] 2 Lloyd's Rep 539, (1968) 112 Sol Jo 623; *Sykes v Midland Bank Executor & Trustee Co*[1971] 1 QB 113, [1970] 2 All ER 471, CA; *Dickinson v Jones Alexander & Co*[1993] 2 FLR 521; *Martin Boston & Co v Roberts* [1996] PNLR 45, (1995) Times, 17 March, CA. Cf *Yeoman's Executrix v Ferries* 1967 SLT 332.

## UPDATE

### 962 Loss of opportunity

NOTE 3--Damages for wrongful dismissal can include compensation for the loss of the opportunity to pursue an unfair dismissal claim: *Raspin v United News Shops Ltd*[1999] IRLR 9, EAT. See also *Watts v Bell & Scott* [2007] CSOH 108, 2007 SLT 665 (claimant entitled to recover for loss of profit he would have made if had not lost opportunity to purchase and develop premises).

NOTE 7--*Kitchin v Royal Air Forces Association*, cited, applied in *Harrison v Bloom Camillin*(1999) Times, 12 November (court could take into account possibility of settlement of lapsed action). See also *Charles v Hugh James Jones & Jenkins (a firm)* [2000] 1 All ER 289, CA (court could be assisted by knowledge of medical evidence at date of trial); and *Dudarec v Andrews*[2006] EWCA Civ 256, [2006] 2 All ER 856.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/B. LOSS OF OPPORTUNITY/963. Parties on whose act or volition the lost opportunity may have depended.

### **963. Parties on whose act or volition the lost opportunity may have depended.**

An opportunity which has subsequently been lost may have depended on the act or volition of certain parties<sup>1</sup>. Damages for loss of a chance may issue where the gain of a prospective benefit, or the possible avoidance of a risk, could (but for the breach) have been brought about by the innocent party's own conduct, or by the conduct of an independent third party<sup>2</sup>, or by a combination of both<sup>3</sup>, or by some extraneous event<sup>4</sup>. There is a very strong probability that a party who was properly advised would have acted in accordance with his own best interests<sup>5</sup>. However, where realisation of the lost opportunity depended on the act or volition of the party in breach, the action may fail, for it is presumed that a party who has the option of performing his contract in different ways will choose the course least beneficial to the other party<sup>6</sup>. Even where the lost prospect was solely contingent on the unrestricted volition of a third party, objective considerations may enable a prediction as to the course which that party would have taken<sup>7</sup>.

<sup>1</sup> *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 928, [1995] 1 WLR 1602 at 1623-1624, CA, per Millett LJ.

<sup>2</sup> *Id* whether or not constrained by objective criteria, as in *Chaplin v Hicks* [1911] 2 KB 786, CA. See also *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 928, [1995] 1 WLR 1602 at 1623-1624, CA, per Millett LJ.

<sup>3</sup> This will be the position in most cases where, for example, negligent advice prevents an innocent party from negotiating a more satisfactory outcome to a proposed contract or from taking other measures against impending liability. The plaintiff must show not only that he personally would have tried to adopt the protective measure but that there was a real and substantial chance that the appropriate third party would have co-operated: see eg *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907, [1995] 1 WLR 1602, CA; *First Interstate Bank of California v Cohen Arnold* [1996] PNLR 17, (1995) Times, 11 November, CA.

<sup>4</sup> *Sapwell v Bass* [1910] 2 KB 486; as explained in *Chaplin v Hicks* [1911] 2 KB 786 at 796, CA, per Fletcher-Moulton LJ. See also generally the classification adopted in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 928, [1995] 1 WLR 1602 at 1623-1624, CA, per Millett LJ.

<sup>5</sup> *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 928-929, [1995] 1 WLR 1602 at 1623-1625, CA, per Millett LJ (in such a case full damages may be awarded subject to a discount to allow for the possibility that something might have occurred to prevent a party from so acting). A case regarded by Millett LJ as falling in this category is *Otter v Church, Adams, Tatham & Co* [1953] 1 Ch 280, [1953] 1 All ER 168. See further PARA 956 ante.

<sup>6</sup> Such a course will also normally be the course most beneficial to the party in breach, but the equation is not invariable: see PARA 956 ante. Cf *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 104 ALR 1, Aust HC.

<sup>7</sup> *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 928, [1995] 1 WLR 1602 at 1623-1624, CA, per Millett LJ, who regarded *Hall v Meyrick* [1957] 2 QB 455, [1957] 2 All ER 722, CA; *Dunbar v A & B Painters Ltd* [1985] 2 Lloyd's Rep 616 (affd [1986] 2 Lloyd's Rep 38, CA); and *Richardson v Mellish* (1824) 2 Bing 229, 1 C & P 241 as falling within this category, and *Spring v Guardian Assurance plc* [1995] 2 AC 296, [1994] 3 All ER 129, HL, as probably so. See also *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, Aust HC.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/B. LOSS OF OPPORTUNITY/964. Evaluation of chance distinguished from remoteness and causation.

#### **964. Evaluation of chance distinguished from remoteness and causation.**

The evaluation of a prospect which fails to materialise following a breach of contract is subordinate to two other matters. Firstly, the innocent party must show (in accordance with normal principle<sup>1</sup>) that the loss of the chance was sufficiently within the parties' contemplation as a serious possible consequence of the breach when the contract was made<sup>2</sup>. Secondly, the innocent party must show that the loss of the chance was caused by the breach<sup>3</sup>. The proof of causation varies according to the type of wrong and the form of loss alleged<sup>4</sup>. Distinctions must be drawn between wrongs of commission and wrongs of omission, and between hypothetical acts of innocent parties and third parties, respectively<sup>5</sup>.

1 As to the normal principle see PARA 1015 post.

2 *Chaplin v Hicks* [1911] 2 KB 786 at 798, CA, per Farwell LJ, at 790-791 per Vaughan Williams LJ, and at 794-795 per Fletcher Moulton LJ. *Chamberlain v Boyd* (1883) 52 LJQB 277 is probably best explained on this ground: see *McGregor on Damages* (16th Edn, 1997) PARA 377. For a modern application of the rules of remoteness in this context see *Hartle v Laceys (a firm)* (28 February 1997, unreported), CA.

3 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 914-916, [1995] 1 WLR 1602 at 1609-1611, CA, per Stuart-Smith LJ. As to causation in contract generally see PARAS 1035-1040 post; and CONTRACT.

4 Ordinarily the issue of causation is governed by the general standard of proof in civil actions: *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, Aust HC. This would require a plaintiff to show on a balance of probabilities that he had sustained some loss or damage. But the loss of a commercial advantage or opportunity, which has been shown to possess some value beyond that which is negligible, may suffice for this purpose: *Sellars v Adelaide Petroleum NL* supra.

5 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 914-916, [1995] 1 WLR 1602 at 1609-1611, CA, per Stuart-Smith LJ. This is the leading judgment in the field and has been followed in the following decisions: *Hartle v Laceys (a firm)* (28 February 1997, unreported), CA; *Stovold v Barlows (a firm)* [1995] NPC 154, [1996] PNL 91, CA; *First Interstate Bank of California v Cohen Arnold* [1996] PNL 17, (1995) Times, 11 November, CA; *Doyle v Wallace* (1998) Times, 22 July, CA (personal injury causing loss of a career opportunity). See also *Obagi v Stanborough (Developments) Ltd* (7 April 1995, unreported), CA (decided before *Allied Maples Group Ltd v Simmons & Simmons* supra). The following decisions must now be read in the light of the decision in *Allied Maples Group Ltd v Simmons & Simmons* supra or of observations therein: *Otter v Church, Adams, Tatham & Co* [1953] 1 Ch 280, [1953] 1 All ER 168; *Griffiths v Evans* [1953] 2 All ER 1364, [1953] 1 WLR 1424, CA; *Hall v Meyrick* [1957] 2 QB 455, [1957] 2 All ER 722, CA; *Kitchen v Royal Air Force Association* [1958] 2 All ER 241, [1958] 1 WLR 563, CA; *Yardley v Coombes* (1963) 107 Sol Jo 575; *Fraser v BN Furman (Productions) Ltd* [1967] 3 All ER 57, [1967] 1 WLR 898, CA; *Davies v Taylor* [1974] AC 207, [1972] 3 All ER 836, HL; *Dunbar v A & B Painters Ltd* [1985] 2 Lloyd's Rep 616 (affd [1986] 2 Lloyd's Rep 38, CA); *Lillicrap v Nalder & Son* [1993] 1 All ER 724, [1993] 1 WLR 94, CA; *Spring v Guardian Assurance plc* [1995] 2 AC 296, [1994] 3 All ER 129, HL. See also *Hotson v East Berkshire Area Health Authority* [1987] AC 750, [1987] 1 All ER 210, HL; *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd* (1984) 157 CLR 149, 55 ALR 509, Aust HC, as discussed in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, Aust HC.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/B. LOSS OF OPPORTUNITY/965. Positive act or misfeasance; where loss a matter of historical fact.

### **965. Positive act or misfeasance; where loss a matter of historical fact.**

Where a breach of duty<sup>1</sup> consists of some positive act or misfeasance, causation is a matter of historical fact<sup>2</sup>. The innocent party must show on the balance of probability that his loss was caused by the act or misfeasance<sup>3</sup>. Once that is shown, the fact of causation is taken as true<sup>4</sup>, and the court will not make a partial or percentage award, graduated according to the degree of probability shown<sup>5</sup>. An innocent party who succeeds (however narrowly) in proving causation receives the full measure of his damage with no discount for the degree of probability, while an innocent party who fails (however narrowly) on this point recovers nothing<sup>6</sup>. It is irrelevant that the evidence brought by the innocent party only marginally tips the balance in his favour, or only marginally falls short of the required balance of probability<sup>7</sup>. Once causation is shown, however, the quantification of the innocent party's loss may well depend on future uncertain events<sup>8</sup>.

1 In *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907, [1995] 1 WLR 1602, CA, consistently with the facts, the statements on this point are limited to cases where there is a breach of a duty of reasonable care, but the proposition in the text appears apt to cover most breaches of contract. Equivalent principles have been held to apply to actions in tort and actions brought under statute: see *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, Aust HC; *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443, (1997) Times, 17 January, CA; *Ministry of Defence v O'Hare (No 2)* [1997] ICR 306; *McFarlane v Wilkinson* [1997] 2 Lloyd's Rep 259; *Rowling v Takaro Properties Ltd* [1988] AC 473, [1988] 1 All ER 163, PC; *Doyle v Wallace* (1998) Times, 22 July, CA.

2 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 914, [1995] 1 WLR 1602 at 1609-1610, CA, per Stuart-Smith LJ; *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 452, (1997) Times, 17 January, CA, per Staughton LJ.

3 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 914, [1995] 1 WLR 1602 at 1609-1610, CA, per Stuart-Smith LJ; *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 452, (1997) Times, 17 January, CA, per Staughton LJ.

4 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 914-915, [1995] 1 WLR 1602 at 1609-1610, CA, per Stuart-Smith LJ.

5 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 915, [1995] 1 WLR 1602 at 1610, CA, per Stuart-Smith LJ.

6 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 917, [1995] 1 WLR 1602 at 1612, CA, per Stuart-Smith LJ, accepting the criticism of Salmon LJ in *Sykes v Midland Bank Executor & Trustee Co* [1971] 1 QB 113, [1970] 2 All ER 471, CA, that *Otter v Church, Adams, Tatham & Co* [1953] 1 Ch 280, [1953] 1 All ER 168 was probably wrong on this point.

7 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 915, [1995] 1 WLR 1602 at 1610, CA, per Stuart-Smith LJ. 'In determining what did happen in the past a Court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the Court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards': *Mallett v McMonagle* [1970] AC 166 at 176, [1969] 2 All ER 178 at 190-191, HL, per Lord Diplock (cited with approval in *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638, 92 ALR 545, Aust HC). See also *Doyle v Wallace* (1998) Times, 22 July, CA.

8 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 915, [1995] 1 WLR 1602 at 1610, CA, per Stuart-Smith LJ.

**UPDATE**

**965 Positive act or misfeasance; where loss a matter of historical fact**

NOTES 7, 8--See *Seafield Holdings (t/a Seafield Logistics) v Drewett* [2006] ICR 1413.

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**966. Omission defeating opportunity contingent on act of claimant.**

Where a breach of duty<sup>1</sup> consists of an omission, and the exercise, enjoyment or exploitation of the disputed opportunity would otherwise have depended solely on the conduct of the innocent party, the innocent party must show on the balance of probability that he would have taken the opportunity had it been available<sup>2</sup>. Where the opportunity took the form of a prospective benefit, the innocent party must show on the balance of probability that he would have acted to obtain the benefit; and where the opportunity would have enabled the innocent party to avoid a risk, the innocent party must show that he would have acted to avoid the risk<sup>3</sup>. Once the necessary balance of probability is shown, the fact of causation is treated as incontrovertible and full damages are awarded, subject to remoteness<sup>4</sup>. The court can impose no discount to reflect a marginal success or make no partial or proportionate award to reflect a marginal failure<sup>5</sup>.

1 In *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907, [1995] 1 WLR 1602, CA, consistently with the facts, the statements on this point are limited to cases where there is a breach of a duty of reasonable care, but the proposition in the text appears apt to cover most breaches of contract.

2 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 915, [1995] 1 WLR 1602 at 1610, CA, per Stuart-Smith LJ. The question in this context is hypothetical (not one of historical fact) and its solution depends on what the innocent party would have done had the contract not been broken and the chance remained available. These are matters to be inferred from all the circumstances: *Allied Maples Group Ltd v Simmons & Simmons* supra.

3 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907, [1995] 1 WLR 1602, CA.

4 See PARAS 964 ante, 1015-1034 post. See also the comments on *Otter v Church, Adams, Tatham & Co* [1953] 1 Ch 280, [1953] 1 All ER 168 in *Sykes v Midland Bank Executor & Trustee Co* [1971] 1 QB 113 at 129-130, [1970] 2 All ER 471 at 480, CA, per Salmon LJ.

5 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907, [1995] 1 WLR 1602, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/B. LOSS OF OPPORTUNITY/967. Exercise of opportunity contingent on act of third party.

### **967. Exercise of opportunity contingent on act of third party.**

An innocent party whose gain of a prospective benefit, or whose avoidance of a prospective risk, was contingent on the conduct of an independent third party must show a real or substantial, and not merely a speculative, chance that the third party would have acted in a manner necessary to the gain of the benefit or the avoidance of the risk<sup>1</sup>. This is so whether the contingent act of the third party which would have achieved the required result would have done so by itself, unaided by other factors, or in alliance with some act of the innocent party<sup>2</sup>. In this context, causation and quantification are linked. The loss of a real or substantial chance is a matter of causation which must be shown on the balance of probability<sup>3</sup>. The evaluation of a real or substantial chance, on the other hand, is a matter of quantification of damages, and the innocent party need not show on the balance of probability that the third party would have acted in the required manner<sup>4</sup>. Provided the chance of the third party's doing so was real or substantial, and more than merely speculative, its deprivation may sound in damages though it was less than 50 per cent<sup>5</sup>.

1 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907, [1995] 1 WLR 1602, CA; following *Davies v Taylor* [1974] AC 207, [1972] 3 All ER 836, HL. See also *Hartle v Laceys (a firm)* (28 February 1997, unreported), CA; *Stovold v Barlows (a firm)* [1995] NPC 154, [1996] PNL 91, CA; *Obagi v Stanborough (Developments) Ltd* (7 April 1995, unreported), CA; *First Interstate Bank of California v Cohen Arnold* [1996] PNL 17, (1995) Times, 11 November, CA; *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443 at 459-460, (1997) Times, 17 January, CA, per Staughton LJ; *Doyle v Wallace* (1998) Times, 22 July, CA. See further *Kitchen v Royal Air Force Association* [1958] 2 All ER 241 at 252, [1958] 1 WLR 563 at 576, CA, per Parker LJ; approved in *Allied Maples Group Ltd v Simmons & Simmons* supra at 916 and 1611 per Stuart-Smith LJ.

2 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 915-916, [1995] 1 WLR 1602 at 1610-1611, CA, per Stuart-Smith LJ.

3 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907, [1995] 1 WLR 1602, CA; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, Aust HC. See also PARA 965 note 5 ante.

4 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907, [1995] 1 WLR 1602, CA (negligence by defendant solicitors in failing to warn plaintiffs against effect of particular clause in contract; plaintiffs succeeded in action for loss of chance to avoid onerous effect of clause by proving: (1) on the balance of probability that, had proper warning been given, the plaintiffs would have approached the other contracting party to negotiate revision of the clause; and (2) that, had such an approach been made, there was a real or substantial chance that the other party would have agreed to a revision, so conferring a total or at least partial protection by way of capped liability on the plaintiffs). See also *Hartle v Laceys (a firm)* (28 February 1997, unreported), CA; *Stovold v Barlows (a firm)* [1995] NPC 154, [1996] PNL 91, CA; *First Interstate Bank of California v Cohen Arnold* [1996] PNL 17, (1995) Times, 11 November, CA. See further PARA 968 post.

5 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 919, [1995] 1 WLR 1602 at 1614-1615, CA, per Stuart-Smith LJ (the range lies somewhere between that which just qualifies as real or substantial on the one hand, and near certainty on the other hand) citing *Davies v Taylor* [1974] AC 207, [1972] 3 All ER 836, HL, and *Kitchen v Royal Air Force Association* [1958] 2 All ER 241 at 252, [1958] 1 WLR 563 at 576, CA, per Parker LJ. See also *Allied Maples Group Ltd v Simmons & Simmons* supra at 928 and 1623-1624 per Millett LJ; *Doyle v Wallace* (1998) Times, 22 July, CA. Some earlier cases involved a greater than 50% chance but do not impose that as a condition (cf *Hall v Meyrick* [1957] 2 QB 455, [1957] 2 All ER 722, CA; and see generally *Allied Maples Group Ltd v Simmons & Simmons* supra at 916 and 1611-1612 per Stuart-Smith LJ) while other earlier cases clearly recognise that a less than 50% chance will suffice (see *Allied Maples Group Ltd v Simmons & Simmons* supra at 916 and 1611-1612 per Stuart-Smith LJ).

### **UPDATE**

**967 Exercise of opportunity contingent on act of third party**

NOTE 1--See *The Law Debenture Trust Corpn plc v Elektrim SA* [2009] EWHC 1801 (Ch), [2009] All ER (D) 304 (Jul).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/B. LOSS OF OPPORTUNITY/968. Evaluation of the opportunity.

### 968. Evaluation of the opportunity.

In evaluating the lost opportunity, regard is paid to the circumstances at large<sup>1</sup>, and in particular to those contingencies which would have affected the course of events had the breach not occurred<sup>2</sup>. The full value of the benefit not received, or the full cost of the risk incurred, will be reduced in proportion to the degree of likelihood that the benefit or risk would have been gained or avoided<sup>3</sup>. The percentage ascribed to the chance will reflect any mixed or split contingency (requiring conduct by both innocent party and third party in order for the prospective benefit or avoidance of risk to be realised)<sup>4</sup> and any double contingency affecting the conduct of either of those parties<sup>5</sup>. Account may be taken of the value of any residual contractual subject matter left in the innocent party's hands after the breach<sup>6</sup>.

1 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907, [1995] 1 WLR 1602, CA.

2 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907, [1995] 1 WLR 1602, CA.

3 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, Aust HC (value of hypothetical commercial opportunity to be ascertained by reference to degree of probability or possibilities: claim of this nature not defeated by reply that commercial opportunity was valueless on the balance of probabilities, for that is to value the commercial opportunity by reference to a standard of proof which is inapplicable). See also *Mallett v McMonagle* [1970] AC 166, [1969] 2 All ER 178, HL, cited in *Sellars v Adelaide Petroleum NL* supra and in *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 640, 92 ALR 545 at 547, Aust HC, per Brennan J and Dawson J.

4 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907, [1995] 1 WLR 1602, CA; *Hartle v Laceys (a firm)* (28 February 1997, unreported), CA; *Stovold v Barlows (a firm)* [1995] NPC 154, [1996] PNLR 91, CA; *First Interstate Bank of California v Cohen Arnold* [1996] PNLR 17, (1995) Times, 11 November, CA; *Obagi v Stanborough (Developments) Ltd* (7 April 1995, unreported), CA; *Doyle v Wallace* (1998) Times, 22 July, CA.

5 Cf *Stovold v Barlows (a firm)* [1995] NPC 154, [1996] PNLR 91, CA (defendant solicitor acting for prospective vendor wrongfully sent contract documents by document exchange system and not by post; late arrival and sale not effected; double contingency that contract documents would not have arrived even if sent by proper means, and that prospective purchaser would still not have bought plaintiff's property; lost chance assessed at 50%).

6 *Hartle v Laceys (a firm)* (28 February 1997, unreported), CA (defendant solicitor negligently failed to advise prospective vendor that property could be sold free of unregistered covenant; covenantee later registered covenant, whereupon sale then under negotiation lost; court found on balance of probability that vendor would, if properly advised, have reduced price at which property offered to prospective purchaser or other persons as incentive for early completion; court further found real and substantial chance that, if vendor properly advised, sale could have been effected at £375,000 before covenantee discovered non-registration and registered covenant; loss of chance of sale at that price left vendor with chance of selling property at indeterminate future time and price; property eventually sold for £150,000; court assessed at 60% vendor's lost opportunity of selling at £375,000; vendor therefore recovered difference between lost potential price and price received (ie £225,000) reduced by 40%). Cf *Chaplin v Hicks* [1911] 2 KB 786, CA, distinguished in *Hartle v Laceys (a firm)* supra per Ward LJ, where the plaintiff had nothing left after the chance was lost. See further *First Interstate Bank of California v Cohen Arnold* [1996] PNLR 17, (1995) Times, 11 November, CA (accountants negligently misrepresented client's financial strength to bank which, relying thereon, made and (at client's request) later extended loan to client, thereby failing to take early opportunity to sell property on which debts secured; bank proved on balance of probability that it would have put the property on the market immediately if truth known; court found real and substantial (ie 2:1) and not fanciful or speculative chance that bank would have got higher price than it actually got when sale finally made; bank awarded 66% of difference between prospective price and price received).

### UPDATE



## **968 Evaluation of the opportunity**

TEXT AND NOTES--Where a solicitor's negligence has caused a claim to be struck out because the issues cannot be fairly tried, the starting point for the judge who has to assess the claimant's prospects of success but for the solicitor's negligence is the conclusion that no trial is possible: *Sharif v Garrett & Co (a firm)* [2001] EWCA Civ 1269, [2002] 3 All ER 195. See also *Dixon v Clement Jones Solicitors (a firm)* [2004] All ER (D) 127 (Jul), CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/C. ULTERIOR OR ONWARD CONTRACTS/(A) In general/969. Ulterior or onward contracts: general.

### **C. ULTERIOR OR ONWARD CONTRACTS**

#### **(A) IN GENERAL**

##### **969. Ulterior or onward contracts: general.**

The mere fact that the innocent party has made a contract with a third party involving the same subject matter as the broken contract neither increases nor reduces the damages recoverable<sup>1</sup>. There is a symmetry between the use of an ulterior contract by the innocent party to increase the damages payable to him and its use by the party in breach to reduce them<sup>2</sup>. To enhance the damages payable<sup>3</sup> such a contract must have been within the contemplation of the party in breach<sup>4</sup>. To reduce the damages payable<sup>5</sup> such a contract must at least<sup>6</sup> have been within the contemplation of the party in breach<sup>7</sup>. Most authorities concern sales of goods, where damages are partially defined by statute<sup>8</sup> and may vary according to the form of the breach<sup>9</sup>.

1 *Rodocanachi v Milburn* (1886) 18 QBD 67; *Slater v Hoyle & Smith* [1920] 2 KB 11, CA. See also *Williams Bros v Ed T Agius Ltd* [1914] AC 510 at 530-531, HL, per Lord Moulton, who said that *Rodocanachi v Milburn* supra 'rests on the sound ground that it is immaterial what the buyer is intending to do with the purchased goods.'

2 *Rodocanachi v Milburn* (1886) 18 QBD 67 at 76-77 per Lord Esher; *Williams Bros v Ed T Agius Ltd* [1914] AC 510 at 520, HL, per Viscount Haldane LC; *Slater v Hoyle & Smith* [1920] 2 KB 11, CA, especially at 20-22 per Scrutton LJ.

3 Eg by showing lost profits: *Great Western Rly Co v Redmayne* (1866) LR 1 CP 329; *Slater v Hoyle & Smith* [1920] 2 KB 11, CA; *Horne v Midland Rly* (1872) LR 7 CP 583, (1873) LR 8 CP 131; *Williams Bros v Ed T Agius Ltd* [1914] AC 510, HL.

4 *Slater v Hoyle & Smith* [1920] 2 KB 11, CA.

5 Eg by showing that the innocent party has in whole or in part recouped his loss elsewhere: see eg *Wertheim v Chicoutimi Pulp Co* [1911] AC 301, PC; *Williams Bros v Ed T Agius Ltd* [1914] AC 510, HL; *Slater v Hoyle & Smith* [1920] 2 KB 11, CA; *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA.

6 Cf paras 970 (non-delivery), 972 (defective goods) post.

7 *Biggin & Co v Permanite* [1951] 1 KB 422 at 427, [1950] 2 All ER 859 at 863 per Devlin J (revsd [1951] 2 KB 314, CA); *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 100-101, [1997] 1 All ER 979 at 989-990, CA, per Otton LJ, and at 105 and 994 per Auld LJ.

8 See the Sale of Goods Act 1979 ss 53, 54; and SALE OF GOODS AND SUPPLY OF SERVICES.

9 Cf paras 970 (non-delivery), 972 (defective goods) post.

#### **UPDATE**

##### **969-974 Ulterior or onward contracts: general ... Differences between goods or contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/C. ULTERIOR OR ONWARD CONTRACTS/(A) In general/970. Non-delivery.

### **970. Non-delivery.**

A seller of goods sued for non-delivery cannot invoke a contract which the buyer had made for their resale at the place of delivery to show that the buyer would have made a loss had the goods been delivered<sup>1</sup>. The value of the goods must be assessed independently of any fortuitous circumstance peculiar to the buyer<sup>2</sup> and without reference to any contract made by him for the onward sale of the goods<sup>3</sup>.

1 *Williams Bros v Ed T Agius Ltd* [1914] AC 510, HL; *Rodocanachi v Milburn* (1886) 18 QBD 67; *Wertheim v Chicoutimi Pulp Co* [1911] AC 301, PC; *Slater v Hoyle & Smith* [1920] 2 KB 11, CA. The concept was apparently not doubted in *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA. The equivalent principle applies to short delivery: see the Sale of Goods Act 1979 s 51(3); and SALE OF GOODS AND SUPPLY OF SERVICES.

2 That is, by reference to the difference between contract price and market value: see *ibid* s 51(3); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 294. See also *Slater v Hoyle & Smith* [1920] 2 KB 11, CA; *Williams Bros v Ed T Agius Ltd* [1914] AC 510 at 516-518, HL, per Lord Haldane.

3 *Rodocanachi v Milburn* (1886) 18 QBD 67; approved in *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 at 307-308, PC; *Williams Bros v Ed T Agius Ltd* [1914] AC 510 at 520, HL, per Lord Haldane (this principle is not affected by the Sale of Goods Act 1979 s 51), and at 522 per Viscount Dunedin; *Slater v Hoyle & Smith* [1920] 2 KB 11 at 21, CA, per Scrutton LJ.

### **UPDATE**

#### **969-974 Ulterior or onward contracts: general ... Differences between goods or contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/C. ULTERIOR OR ONWARD CONTRACTS/(A) In general/971. Delay in delivery.

### **971. Delay in delivery.**

Where a seller of goods delivers late to a buyer who then resells for more than the current market value, the price received under the sub-sale is taken into account in assessing the buyer's damages<sup>1</sup>. In measuring his loss, the buyer must give credit for the true value of the goods to him, which is the price payable to him under the sub-sale<sup>2</sup>. In such events any ordinary presumption<sup>3</sup>, that damages are to be measured by the difference between the contract price and the market value at the time of delivery<sup>4</sup>, is displaced<sup>5</sup>. It appears, however, that reference to the sub-sale is permissible only where the identical goods are sub-sold and not where they are sold onward in an altered state<sup>6</sup>.

1 *Wertheim v Chicoutimi Pulp Co* [1911] AC 301 at 307-308, PC; distinguishing *Rodocanachi v Milburn* (1886) 18 QBD 67. See also *Williams Bros v Ed T Agius Ltd* [1914] AC 510 at 529, HL, per Lord Atkinson ('That case [*Rodocanachi v Milburn* supra] has, of course, no reference whatever to cases of the late delivery of goods as distinguished from their non-delivery').

2 *Wertheim v Chicoutimi Pulp Co* [1911] AC 301, PC.

3 Cf *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 104-105, [1997] 1 All ER 979 at 994, CA, per Auld LJ.

4 Cf *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 97-98, [1997] 1 All ER 979 at 987, CA, per Otton LJ (the Sale of Goods Act 1979 s 53(3) lays down a rebuttable presumption).

5 *Wertheim v Chicoutimi Pulp Co* [1911] AC 301, PC; approved in *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA; distinguished in *Slater v Hoyle & Smith* [1920] 2 KB 11, CA. See also *Williams Bros v Ed T Agius Ltd* [1914] AC 510 at 529, HL, per Lord Atkinson.

6 *Wertheim v Chicoutimi Pulp Co* [1911] AC 301, PC, was thus distinguished in *Slater v Hoyle & Smith* [1920] 2 KB 11, CA, by all three members of the Court of Appeal. The decision has in any event been doubted by Scrutton LJ in *Slater v Hoyle & Smith* supra at 23, albeit merely distinguished by the majority. *Wertheim v Chicoutimi Pulp Co* supra was distinguished from, and thus held to be consistent with, *Rodocanachi v Milburn* (1886) 18 QBD 67 on the ground that *Wertheim v Chicoutimi Pulp Co* supra was a case 'not of delivery withheld, but of delivery delayed' by Lord Dunedin in *Williams Bros v Ed T Agius Ltd* [1914] AC 510 at 522, HL.

### **UPDATE**

#### **969-974 Ulterior or onward contracts: general ... Differences between goods or contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/C. ULTERIOR OR ONWARD CONTRACTS/(B) Defective Goods/972. Defective goods.

## (B) DEFECTIVE GOODS

### 972. Defective goods.

Whether a resale contract made by the buyer reduces the liability of the original seller for breach of warranty of quality<sup>1</sup>, and removes his damages beyond those defined as the prima facie measure by statute<sup>2</sup>, depends mainly on whether the secondary contract was within the contemplation of the parties to the original contract<sup>3</sup>.

<sup>1</sup> See under the Sale of Goods Act 1979 s 53: see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 63, 307 et seq.

<sup>2</sup> See *ibid* s 53(3); paras 971 note 4 ante, 1056 post; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 309.

<sup>3</sup> *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 100-101, [1997] 1 All ER 979 at 989-990, CA; *Biggin & Co v Permanite* [1951] 1 KB 422 at 427, [1950] 2 All ER 859 at 863 per Devlin J (revsd [1951] 2 KB 314, CA); cf *Slater v Hoyle & Smith* [1920] 2 KB 11, CA. As to contemplation see PARA 973 post.

## UPDATE

### 969-974 Ulterior or onward contracts: general ... Differences between goods or contracts

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/C. ULTERIOR OR ONWARD CONTRACTS/(B) Defective Goods/973. Contemplation.

### 973. Contemplation.

In general, a seller of defective goods cannot invoke a resale contract which the buyer has made with a third party, for the purpose of showing that the buyer resold the goods at a price greater than their market value<sup>1</sup>. He may do so, however, where the resale contract was within the parties' contemplation<sup>2</sup> at the time of the original contract<sup>3</sup>. If, when making that contract, the parties were aware of facts which indicated to both of them that the buyer's loss would be something other than the difference between the value of the goods delivered and the market value<sup>4</sup>, the latter measure does not apply<sup>5</sup>, but is displaced in favour of the buyer's true and contemplated loss as measured by the resale contract<sup>6</sup>. Damages are thereupon assessed on an indemnity basis<sup>7</sup> rather than a diminution in value basis<sup>8</sup>.

1 See *Slater v Hoyle & Smith* [1920] 2 KB 11 at 23, CA, where Scrutton LJ said that the resale contract is res inter alios acta, a matter peculiar to the buyer. This decision was approved in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL (see especially at 112 and 434 per Lord Browne-Wilkinson, who cited it as showing that in a contract for the sale of goods 'the purchaser is entitled to damages for delivery of defective goods assessed by reference to the difference between the contract price and the market price of the defective goods, irrespective of whether he has managed to sell on the goods to a third party without loss ...; see also as to non-delivery *Williams Bros v ET Agius Ltd* [1914] AC 510'). *Slater v Hoyle & Smith* supra was also approved by Denning LJ in *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 253, [1952] 1 All ER 796 at 800, CA. See also *Gardiner v Metcalf* [1994] 2 NZLR 8 (crop destroyed by trespassing cattle; insolvency of onward purchaser did not support argument by defendant that plaintiff had suffered no loss). But cf *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA (damages for defective goods, where *Slater v Hoyle & Smith* [1920] 2 KB 11, CA, was doubted at 102-103 and 992 per Auld LJ; cf Otton LJ at 98-99 and 988 who distinguished the decision; and see *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46 at 94, (1998) Times, 11 February, CA, which seeks to rationalise these and other authorities by reference to the agreement, intention or contemplation on the part of the parties to the original contract. The position may be otherwise where there is no other evidence of general market value. Where the resale contract itself affords the best indication of the market value of the defective goods, the price obtained under the contract may well be taken into account in assessing damages: *Slater v Hoyle & Smith* supra at 17 per Warrington LJ; *Biggin & Co v Permanite* [1951] 1 KB 422 at 427, [1950] 2 All ER 859 at 863 per Devlin J (revsd [1951] 2 KB 314, CA); *McGregor on Damages* (16th Edn, 1997) p 591; cf *Aitchison v Gordon Durham & Co Ltd* (30 June 1995, unreported), CA. See also PARA 953 ante.

2 Ie in accordance with the normal principles first laid down in *Hadley v Baxendale* (1854) 9 Ex 341.

3 *Slater v Hoyle & Smith* [1920] 2 KB 11, CA; distinguished on this ground by Otton LJ in *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 98-99, [1997] 1 All ER 979 at 988, CA.

4 This is the prima facie measure as defined by statute: see the Sale of Goods Act 1979 53(3), whereby in a case of breach of warranty of quality the buyer's loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty: see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 309. In *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 101, [1997] 1 All ER 979 at 990, CA, per Otton LJ and at 102 and 991-992 per Auld LJ, there was disagreement as to whether this prima facie measure afforded even a presumptive test.

5 *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA; *Biggin & Co v Permanite* [1951] 1 KB 422 at 436, [1950] 2 All ER 859 at 869 per Devlin J (revsd [1951] 2 KB 314, CA).

6 *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA; *Biggin & Co v Permanite* [1951] 1 KB 422 at 436, [1950] 2 All ER 859 at 869 per Devlin J (revsd [1951] 2 KB 314, CA).

7 Ie the buyer's liability to the subsidiary buyers.

8 *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 101, [1997] 1 All ER 979 at 990, CA, per Otton LJ.

## **UPDATE**

### **969-974 Ulterior or onward contracts: general ... Differences between goods or contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **973 Contemplation**

NOTE 1--*Alfred McAlpine*, cited, reversed on different grounds: [2000] 4 All ER 97, HL.



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#### **974. Differences between goods or contracts.**

The buyer may be unable to rely on a resale contract where the goods contracted for under it are not substantially the same as those supplied under the original contract<sup>1</sup>. Where, however, the parties contemplated that the defective goods would be both converted and resold by the buyer, the proper measure of damages may be the loss the buyer suffers under the resale contracts which could be more or less than the difference in their market value<sup>2</sup>.

1 *Slater v Hoyle & Smith* [1920] 2 KB 11, CA; *Williams Bros v Ed T Agius Ltd* [1914] AC 510 at 523, HL, per Viscount Dunedin; *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 98-99, [1997] 1 All ER 979 at 988, CA, per Otton LJ. Cf *McGregor on Damages* (16th Edn, 1997) pp 591-592; and *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 102, [1997] 1 All ER 979 at 992, CA, per Auld LJ.

2 *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA. As to the sort of facts which might support this conclusion see *Bence Graphics International Ltd v Fasson UK Ltd* supra at 100-101 and 989-990 per Otton LJ. See also *R Pagnan & Fratelli v Corbisa Industrial Agropacuaria Ltda* [1971] 1 All ER 165, [1970] 1 WLR 1306, CA; cited in *Bence Graphics International Ltd v Fasson UK Ltd* supra at 104 and 993 per Auld LJ (buyer first rejected defective goods but later accepted them after negotiating reduced price lower than market price for similar goods at date of breach; held, since buyer had suffered no loss, prima facie measure of market price under the Sale of Goods Act 1979 s 53(3) did not apply).

#### **UPDATE**

#### **969-974 Ulterior or onward contracts: general ... Differences between goods or contracts**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/C. ULTERIOR OR ONWARD CONTRACTS/(B) Defective Goods/975. Uncertainty of existing law.

### 975. Uncertainty of existing law.

Some of the foregoing propositions are tentative because the authorities are unsettled<sup>1</sup>. It is possible that they can be reconciled by reference to the parties' intentions, so that substantial damages will be recoverable, notwithstanding a lucrative resale contract, if the parties intended or contemplated substantial recovery<sup>2</sup>. A resale contract might be excluded from consideration as *res inter alios acta*<sup>3</sup> notwithstanding that the resale was contemplated by the seller and that the goods resold are substantially unchanged<sup>4</sup>. The exclusion might be justified on grounds that the buyer may not be obliged to use the supplied goods to fulfil the subsidiary contract<sup>5</sup> and that the damages payable to the sub-buyer might be calculated in a wholly different way from the damages payable under the main contract<sup>6</sup>. Further, if the goods had been of sufficient standard the buyer might have sold them for more, in which event his damages might be greater<sup>7</sup>. It is desirable that the resolution of speculative issues relating to the subsidiary contract be confined to proceedings between the parties to that contract<sup>8</sup>, and not be introduced into the relationship of original seller and buyer<sup>9</sup>. In so far as these principles award more than an indemnity they are a necessary and acceptable departure from the rule that damages are compensatory<sup>10</sup>.

1 The uncertainty emanates principally from the decision of the Court of Appeal in *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 98-99, [1997] 1 All ER 979 at 988, CA, where Otton LJ distinguished *Slater v Hoyle & Smith* [1920] 2 KB 11, CA, broadly on the grounds set out in the text (contemplation and alteration). In *Bence Graphics International Ltd v Fasson UK Ltd* supra Auld LJ at 102 and 992 found these distinctions unconvincing and disapproved *Slater v Hoyle & Smith* supra outright. In *Bence Graphics International Ltd v Fasson UK Ltd* supra at 109 and at 997-998, Thorpe LJ dissented on a point of evidence, and none of the judges in that case referred to the fact that *Slater v Hoyle & Smith* supra was approved in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL.

2 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

3 *Slater v Hoyle & Smith* [1920] 2 KB 11 at 23, CA, per Scrutton LJ.

4 'Either the sub-sale was of the identical article which was the subject of the principal sale or it was not. If it was not, it is absurd to suppose that a contract with a third party as to something else, just because it is the same kind of thing, can reduce the damages which the unsatisfied buyer is entitled to recover under the original contract. If, on the other hand, the sub-sale is of the selfsame thing or things as is or are the subject of the principal sale, then ex hypothesi the default of the seller in the original sale is going to bring about an enforced default on the part of the original buyer and subsequent seller. And how can it ever be known that the damages recoverable under that contract will be calculable in precisely the same way as in the original contract? All that will depend upon what the sub-buyer will be able to make out. The only safe plan is, therefore, in the original contract, to take the difference of market price as the measure of damages and to leave the sub-contract and the breach thereof to be worked out by those whom it directly concerns': *Williams Bros v Ed T Agius Ltd* [1914] AC 510 at 523, HL, per Viscount Dunedin; cf *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA.

5 *Slater v Hoyle & Smith* [1920] 2 KB 11 at 20-23, CA, per Scrutton LJ; but cf *McGregor on Damages* (16th Edn, 1997) PARAS 880-882.

6 *Slater v Hoyle & Smith* [1920] 2 KB 11 at 20-23, CA, per Scrutton LJ; *Williams Bros v Ed T Agius Ltd* [1914] AC 510 at 523, HL, per Viscount Dunedin.

7 *Slater v Hoyle & Smith* [1920] 2 KB 11 at 17-18, CA, per Warrington LJ; but cf *McGregor on Damages* (16th Edn, 1997) PARAS 879-880.

8 le buyer and sub-buyer.

9 *Slater v Hoyle & Smith* [1920] 2 KB 11 at 20-23, CA, per Scrutton LJ; *Williams Bros v Ed T Agius Ltd* [1914] AC 510 at 523, HL, per Viscount Dunedin.

10 *Slater v Hoyle & Smith* [1920] 2 KB 11 at 23-24, CA, per Scrutton LJ; but cf *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA, where this was disapproved at 102-105 and 992-994 per Auld LJ. It was held that courts must avoid an insensitively mechanical resort to differences in market value as the measure of the buyer's loss.

## **UPDATE**

### **975 Uncertainty of existing law**

NOTE 2--*Alfred McAlpine*, cited, reversed: [2000] 4 All ER 97, HL.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(iv) Special Classes of Loss/D. BAILMENT/976. Actions against bailees or other service providers.

### ***D. BAILMENT***

#### **976. Actions against bailees or other service providers.**

An innocent contracting party who has the property in goods at the time of the breach, and who is a party to a contract obliging the party in breach to perform some service in relation to those goods<sup>1</sup> can recover from the party in breach substantial damages based on the value of the goods. It is immaterial for this purpose that the innocent contracting party, having contractually placed the risk elsewhere, suffers no substantial loss<sup>2</sup>.

1 Eg a contract for carriage.

2 *Obestain Inc v National Mineral Development Corpn Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465; *The Aramis* [1989] 1 Lloyd's Rep 213, CA. As to damages in bailment see further PARA 1086 et seq post. The claimant may then hold the damages recovered on behalf of the party suffering substantial loss: see PARA 1005 post.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(v) The Expectation Measure/977. Protection of expectation interest.

## **(v) The Expectation Measure**

### **977. Protection of expectation interest.**

The primary object of damages in contract is to put the innocent party in the position which he would have occupied had the contract been performed<sup>1</sup>. The interest thus protected is known as the expectation interest, the general aim of the law being to redress the innocent party's defeated financial expectation and compensate him for his loss of bargain<sup>2</sup>.

1 *Robinson v Harman*(1848) 1 Exch 850 at 855 per Parke B; *Addis v Gramophone Co Ltd*[1909] AC 488 at 494, HL, per Lord Atkinson; *Wertheim v Chicoutimi Pulp Co*[1911] AC 301 at 307, PC; *Williams Bros v Ed T Agius Ltd*[1914] AC 510, HL, at 531 per Lord Moulton; *The Unique Mariner (No 2)* [1979] 1 Lloyd's Rep 37 at 54 per Brandon J; *Ruxley Electronics & Construction Ltd v Forsyth*[1996] AC 344 at 355, [1995] 3 All ER 268 at 272, HL, per Lord Jauncey of Tullichettle, and at 365-366 and 281-282 per Lord Lloyd of Berwick; *Bence Graphics International Ltd v Fasson UK Ltd*[1998] QB 87 at 103, [1997] 1 All ER 979 at 992, CA, per Auld LJ. See Coote 'Contract Damages: 'Ruxley' and the Performance Interest' [1997] CLJ 537. See also PARA 944 ante.

2 Factual manifestations of the expectation interest are numerous and diverse. These may include onward profits lost by a fall in market after late delivery of goods by a carrier (*Koufos v C Czarnikow Ltd*[1969] 1 AC 350, sub nom *Koufos v C Czarnikow Ltd, The Heron II*[1967] 3 All ER 686, HL) or lost profits deriving from a buyer's non-acceptance of goods where there is no demand in the market for as many goods of that nature as the seller can sell (see PARA 1056 post). In certain cases, there may be more than one potential market for the goods and the court must identify the market which is appropriate or relevant to the particular claim: *Charrington & Co Ltd v Wooder* [1914] AC 71, HL (two market prices for the same beers, one for tied tenants and one for non-tied tenants); *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, [1977] 3 All ER 1048, HL (whiskey stolen before export from Scotland; claim under the Carriage of Goods by Road Act 1965; court obliged to choose between domestic and export market for purposes of quantifying value of consignment at time and place accepted for carriage). See also *Combex Ltd v Cork N Seals Ltd* (1942) 86 Sol Jo 376, DC; *Cory v Thames Ironworks Co*(1868) LR 3 QB 181; para 1033 post. Other elements which may be comprehended in an action in respect of expectation loss include the cost of hiring a substitute chattel for one which is defective and supplied in breach of contract (see *UCB Leasing Ltd v Holtom* [1987] RTR 362, [1987] NLJ Rep 614, CA), and loss of turnover (*Kliger v Sadwick*[1947] 1 All ER 840).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(v) The Expectation Measure/978. Financial loss only.

**978. Financial loss only.**

The judicial task is largely limited to assessing financial loss<sup>1</sup>. The innocent party is entitled only to be put in the same financial position as if due performance of the contract had occurred<sup>2</sup>, and cannot necessarily demand to be put in the same physical position, at least in a commercial case<sup>3</sup> or in a case where the cost of physical reinstatement would be disproportionate and unreasonable<sup>4</sup>. In limited circumstances, however, an innocent party can recover damages for defeated expectations of enjoyment or relief from stress where these expected benefits failed to materialise by reason of the breach but are unreflected in any financial loss<sup>5</sup>.

1 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 366, [1995] 3 All ER 268 at 282, HL, per Lord Lloyd of Berwick. Cf Coote 'Contract Damages: 'Ruxley' and the Performance Interest' [1997] CLJ 537.

2 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 366, 371, [1995] 3 All ER 268 at 282, 286, HL, per Lord Lloyd of Berwick.

3 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 360, [1995] 3 All ER 268 at 276-277, HL, per Lord Mustill.

4 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL; *Sealace Shipping Co Ltd v Oceanvoice Ltd* [1991] 1 Lloyd's Rep 120, CA; *Wigzell v School for Indigent Blind* (1880) 43 LT 218. Cf *Pell v Shearman* (1855) 10 Exch 766 at 769-770; and see Coote 'Contract Damages: 'Ruxley' and the Performance Interest' [1997] CLJ 537 at 541 et seq.

5 See PARA 957 et seq ante. As to damages for loss of opportunity see PARAS 962-968 ante.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(v) The Expectation Measure/979. Repudiatory breach.

### 979. Repudiatory breach.

Where a breach is repudiatory, and the innocent party accepts the repudiation, the damages payable are damages for loss of bargain<sup>1</sup>. The innocent party can recover damages to compensate him, both for loss suffered in consequence of those breaches which preceded his acceptance of the repudiation, and for the loss of his opportunity to receive performance of the other party's outstanding obligations under the contract<sup>2</sup>. A breach can be rendered repudiatory for this purpose by a stipulation that the particular term is a condition<sup>3</sup> or that full performance is of the essence of the contract<sup>4</sup>. Such stipulations do not attract the rule against penalties<sup>5</sup>, although their practical effect can resemble that of a penalty clause<sup>6</sup>. They are commonly used in contracts of hire to enable the lessor to demand the accelerated payment of future instalments on a single breach by the hirer<sup>7</sup>.

1 *Lombard North Central plc v Butterworth* [1987] QB 527, [1987] 1 All ER 267, CA. As to repudiatory breach see CONTRACT vol 9(1) (Reissue) PARA 997 et seq.

2 *Lombard North Central plc v Butterworth* [1987] QB 527 at 545, [1987] 1 All ER 26 at 279, CA, per Nicholls LJ, who described this proposition as 'incontrovertible'.

3 Provided the word is used in its technical sense: see *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL; CONTRACT vol 9(1) (Reissue) PARA 997 et seq.

4 *Lombard North Central plc v Butterworth* [1987] QB 527, [1987] 1 All ER 267, CA; and see CONTRACT vol 9(1) (Reissue) PARA 997 et seq.

5 *Lombard North Central plc v Butterworth* [1987] QB 527, [1987] 1 All ER 267, CA (where it was said that, given its context, a clause in a hire agreement purporting to make punctual payment of every instalment of the essence of the agreement seemed to be intended to bring about the result that default in punctual payment was to be regarded as a breach going to the root of the contract and, hence, as giving rise to the consequences in damages attendant on such a breach: see *Lombard North Central plc v Butterworth* supra at 545 and 279 per Nicholls LJ). See also PARA 1083 post; BAILMENT vol 3(1) (2005 Reissue) PARA 58. As to penalties see generally para 1065 et seq post.

6 *Lombard North Central plc v Butterworth* [1987] QB 527 at 546, [1987] 1 All ER 267 at 280, CA, per Nicholls LJ. Cf *Financings Ltd v Baldock* [1963] 2 QB 104, [1963] 1 All ER 443.

7 See McKendrick, in Palmer and McKendrick (eds) *Interests in Goods* (2nd Edn, 1998) p 968; and BAILMENT vol 3(1) (2005 Reissue) PARA 58. The sum payable will normally be abated to reflect the acceleration in payment.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(v) The Expectation Measure/980. No substantial damages if no loss.

**980. No substantial damages if no loss.**

An innocent party who cannot show that he occupies a worse financial position after breach than he would have occupied had the contract been performed can ordinarily recover only nominal damages for breach of contract<sup>1</sup>. That may be the position where a seller's wrongful failure to deliver goods allows the buyer to buy them more cheaply on the general market, or where a builder's breach of some trifling term as to the materials to be used causes a commercial customer no recoverable loss of amenity or diminution in the value of the building<sup>2</sup>, or where goods delivered in breach of a contract of sale are no less valuable or saleable than those which should have been delivered<sup>3</sup>, or where the value of land sold in breach of a promise that there is no prohibition on building is the same as the price paid for it<sup>4</sup>, or where a carrier whose charterer is in breach of the obligation to load is engaged by another charterer at an equally or more lucrative rate<sup>5</sup>. However, modern authorities show an increasing refinement in the identification of loss and a greater readiness to detect substantial loss<sup>6</sup>, a position complicated by the controversy as to whether certain forms of financial award are in damages (compensatory) or for unjust enrichment (restitutionary)<sup>7</sup>. In certain events, moreover, damages for loss of amenity are recoverable in the absence of any accompanying financial loss<sup>8</sup>.

1 This principle is subject to the possibility that the innocent party may be able to claim for his reliance loss, that is, for losses incurred by him in reliance on the performance of the contract: see PARAS 987-996 post. As to nominal damages generally see PARA 813 ante.

2 Cf *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL.

3 *Taylor v Bank of Athens* (1922) 91 LJB 776.

4 *Ford v White & Co* [1964] 2 All ER 755, [1964] 1 WLR 885.

5 *Staniforth v Lyall* (1830) 7 Bing 169.

6 See eg *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL; and PARA 1004 et seq post.

7 See PARAS 941-947 post.

8 See PARA 961 ante.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(v) The Expectation Measure/981. Reasonableness.

### 981. Reasonableness.

The damages claimed must be reasonable<sup>1</sup>. This is a separate principle from that which requires the innocent party to do that which is reasonable to mitigate his loss<sup>2</sup>. It debars the innocent party from recovering the cost of a remedial programme which it would not be reasonable to adopt in the circumstances. Such cost is not allowable unless both necessary and reasonable. It is disallowed where the adoption of the disputed remedial programme is quite unreasonable or economically wasteful or out of all proportion to the benefit which can be expected to accrue from it<sup>3</sup>. In answering this issue, the personal predilections of the innocent party are relevant but not decisive. Also material are the relative cost of the available remedial options, the benefits of each, the availability of any median solution between disproportionate damages and mere nominal damages<sup>4</sup>, and the use to which the innocent party intends to put the damages claimed<sup>5</sup>.

1 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL; and see *Jacob and Youngs v Kent* (1921) 129 NE 889 at 891-892 per Cardozo J; *Bellgrove v Eldridge* (1954) 90 CLR 613 at 618, Aust HC; *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] AC 406 at 434-435, [1965] 3 All ER 619 at 629-630, HL, per Lord Cohen; *CR Taylor (Wholesale) Ltd v Hepworths Ltd* [1977] 2 All ER 784 at 792, [1977] 1 WLR 659 at 667 per May J; *Tito v Waddell (No 2)* [1977] Ch 106, [1977] 3 All ER 129; *William Cory & Son Ltd v Wingate Investments (London Colney) Ltd* (1978) 248 EG 687, 17 BLR 104; *Radford v de Froberville* [1978] 1 All ER 33 at 53-54, [1977] 1 WLR 1262 at 1283 per Oliver J; *Minscombe Properties Ltd v Sir Alfred McAlpine & Son Ltd* (1986) 279 EG 759, CA; *Imodco Ltd v Wimpey Major Projects Ltd* (1987) 40 BLR 1 at 19, CA, per Glidewell LJ; *GW Atkins Ltd v Scott* (1991) 7 Const LJ 215; *Channel Island Ferries Ltd v Cenargo Navigation Ltd* [1994] 2 Lloyd's Rep 161 at 166-167 per Phillips J; *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 907, [1995] 1 WLR 68 at 79, CA, per Steyn LJ.

2 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 370-371, [1995] 3 All ER 268 at 286-287, HL, per Lord Lloyd of Berwick, disapproving the dictum of Staughton LJ in the Court of Appeal.

3 *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 907, [1995] 1 WLR 68 at 79, CA, per Steyn LJ; *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 369-371, [1995] 3 All ER 268 at 285-287, HL, per Lord Lloyd of Berwick. Cf Coote 'Contract Damages: 'Ruxley' and the Performance Interest' [1997] CLJ 537.

4 Eg damages for loss of amenity: *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344 at 374-375, [1995] 3 All ER 268 at 289-290, HL, per Lord Lloyd of Berwick. As to damages for loss of amenity see PARA 957 et seq ante.

5 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL. See further PARA 982 post. This factor may also be relevant in determining whether the innocent party has suffered loss: *Ruxley Electronics & Construction Ltd v Forsyth* supra at 366-370 and 282-285 per Lord Lloyd of Berwick. See generally Coote 'Contract Damages: 'Ruxley' and the Performance Interest' [1997] CLJ 537.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(v) The Expectation Measure/982. Use to which damages are put.

**982. Use to which damages are put.**

There is no absolute rule that damages are recoverable only if the innocent party intends or undertakes to apply them in fulfilment of the very purpose (for example, reinstatement or replacement) by reference to which they are assessed<sup>1</sup>. However, the existence or otherwise of such an intention or undertaking is a strong factor in determining whether it is reasonable<sup>2</sup> to award damages in the measure sought<sup>3</sup>.

1 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL; cf *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 97, [1993] 3 All ER 417 at 422, HL, per Lord Griffiths. See also *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 908, [1995] 1 WLR 68 at 80, CA, per Steyn LJ; *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA, per Evans LJ; *Dean v Ainley* [1987] 3 All ER 748, [1987] 1 WLR 1729, CA.

2 As to the reasonableness principle see PARA 981 ante.

3 *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL.

**UPDATE**

**982 Use to which damages are put**

NOTE 1--*Alfred McAlpine*, cited, reversed on different grounds: [2000] 4 All ER 97, HL.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(v) The Expectation Measure/983. Betterment and 'new for old'.

### 983. Betterment and 'new for old'.

No allowance is ordinarily made within an award of damages to reflect any extra benefit or value gained by an innocent party who acts reasonably in replacing or reinstating real or personal property in which he has an interest and which has been lost or impaired by reason of the breach<sup>1</sup>, provided the recovery of such repair or replacement cost is permissible on general principles<sup>2</sup>. The fact that the repaired or replacement item is superior to its predecessor does not by itself justify the award of a lower sum than the cost of repair or replacement, provided that the innocent party has not unnecessarily enlarged the original property<sup>3</sup>, or added avoidable extras<sup>4</sup>, or in some way derived other new benefits which are not required to repair his loss<sup>5</sup>; and that the extras or benefits accrue purely from the innocent party's attempt to match the original property as closely as is reasonably possible in the circumstances<sup>6</sup>; and that recovery of the full cost of replacement or reinstatement would not lead to absurdity<sup>7</sup>. Where these conditions are met, the fact that an innocent party thereby obtains larger or newer premises<sup>8</sup>, or a new chattel in place of an old one<sup>9</sup>, or property with a longer life-span<sup>10</sup>, does not warrant a reduction in the award if the betterment was inevitable in the circumstances<sup>11</sup> and represented the only possible way in which the innocent party could have retrieved his position<sup>12</sup>. In many cases, such as those involving replacement chattels which have a longer life than the chattels replaced, the value of the extra benefit will in any event be conjectural, because there will be no clear evidence as to what the innocent party would have done had the former chattel survived to the end of its natural life-span<sup>13</sup>. The principles which govern this question coincide with those which apply to actions in tort<sup>14</sup>.

1 *Harbutt's Plasticine v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447 at 467-468, [1970] 1 All ER 225 at 236, CA, per Lord Denning MR.

2 Eg principles such as remoteness and mitigation: see PARAS 1015-1034, 1041-1044 post.

3 *Dominion Mosaics & Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246 at 252, [1989] 1 EGLR 164 at 167, CA, per Taylor LJ.

4 *Dominion Mosaics & Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246 at 252, [1989] 1 EGLR 164 at 167, CA, per Taylor LJ.

5 *Harbutt's Plasticine v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447 at 473, [1970] 1 All ER 225 at 240, CA, per Widgery LJ.

6 *Harbutt's Plasticine v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447 at 468, [1970] 1 All ER 225 at 236, CA, per Lord Denning MR, at 473 and 240 per Widgery LJ, and at 475-476 and 242 per Cross LJ.

7 *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397; cited in *Dominion Mosaics & Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246 at 254, [1989] 1 EGLR 164 at 167, CA, per Taylor LJ.

8 *Harbutt's Plasticine v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225, CA (plaintiffs sued in contract for necessary reinstatement of their factory resulting from defendants' installation of faulty heating system and consequent destruction of former premises; reinstatement held to be a reasonable course of action in the circumstances since factory was income-earning and plaintiffs needed both to replace revenue and mitigate loss; plaintiffs incorporated no extras in the new premises and spent no more than was needed to replace the old structure, though using a new design; some improvement therefore inevitable in the circumstances; held, since the decision to reinstate was reasonable, no allowance or deduction would be made for the fact that the new premises were better than the old premises); *Dominion Mosaics & Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246, [1989] 1 EGLR 164, CA (action in tort against demolition contractors whose negligence damaged income-earning premises, necessitating demolition; diminution in value

was £60,000 leaving residual value of £25,000, while cost of reinstatement would have been £570,000, involving loss of profit of £300,000 per annum over reinstatement period; plaintiffs acted reasonably in acquiring residue of lease of other premises at cost of £390,000, and had made no deliberate enlargement or addition of extras; held, cost of new lease recoverable, and no allowance made for fact that new premises had 20% extra floor space; later profits made by plaintiffs on move to further premises also not to be brought into account). See also *Hollebone v Midhurst and Fenhurst Builders and Eastman & White of Midhurst* [1968] 1 Lloyd's Rep 38; *Skandia Property (UK) Ltd v Thames Water Utilities Ltd* (1997) 57 ConLR 65; *Commonwealth of Australia v Silverton Ltd* (1997) 130 ACTR 1; and Coote 'Contract Damages: 'Ruxley' and the Performance Interest' [1997] CLJ 537.

9 *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397 (action in contract for cost of replacing rotor part of plaintiff's fragmentiser following defendants' supply of incorrect metal for crushing; plaintiff sued for cost of new rotor; new rotor had full life-span of seven years as compared to less than four years unexpired life of the old rotor; held, where no second hand substitute of equivalent life is available, plaintiff can recover cost of new item without deduction for extra life-span, where this would not cause absurdity; no absurdity in awarding full cost of new rotor here, though result might be otherwise where destroyed plant had only a short outstanding life); *Dominion Mosaics & Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246, [1989] 1 EGLR 164, CA (action in tort in respect of negligent destruction of six-month old machinery bought new by plaintiffs at bargain price of £13,500; new replacement machines would cost £65,000; no evidence of any available second-hand source, so only way of replacing was to buy new machines; full new replacement cost awarded and plaintiffs not restricted to amount they paid for machines; defendants did not claim any deduction in respect of six-month expired life-span, though this point 'would have merited consideration' at 255 per Taylor LJ).

10 *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397.

11 *Harbutt's Plasticine v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447 at 475-476, [1970] 1 All ER 225 at 242, CA, per Cross LJ.

12 *Harbutt's Plasticine v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447 at 468, [1970] 1 All ER 225 at 236, CA, per Lord Denning MR.

13 *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397.

14 *Dominion Mosaics & Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246 at 249-250, [1989] 1 EGLR 164 at 166, CA, per Taylor LJ; *Hollebone v Midhurst and Fenhurst Builders and Eastman & White of Midhurst* [1968] 1 Lloyd's Rep 38. See PARA 862 ante.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(v) The Expectation Measure/984. Relation to compensatory principle.

#### **984. Relation to compensatory principle.**

In so far as an allowance for betterment entitles an innocent party to damages greater than the strict value of his loss, and thus departs from the rule that damages are compensatory<sup>1</sup>, it has been justified on grounds that (1) no innocent party should be compelled to divert his resources into, or invest capital in, an asset in which he would not otherwise have chosen to invest<sup>2</sup>; (2) where an innocent party incidentally derives from the award a benefit greater than mere indemnification, this arises only from the impossibility of otherwise effecting such indemnification without exposing the innocent party to some loss or burden which the law refuses to impose on him<sup>3</sup>; and (3) the party in breach must bear any inconvenience resulting from the difficulty of assessing damages and has no right to visit that inconvenience on the innocent party or to call on the innocent party to assist him in any way<sup>4</sup>.

1 As to this rule see generally para 941 et seq ante.

2 *Dominion Mosaics & Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246 at 250, [1989] 1 EGLR 164 at 166, CA, per Taylor LJ; citing *Harbutt's Plasticine v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447 at 473, [1970] 1 All ER 225 at 240, CA, per Widgery LJ.

3 *The Gazelle* (1844) 2 W Rob 279; *The Pactolus* (1856) Swab 173.

4 *The Gazelle* (1844) 2 W Rob 279.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(v) The Expectation Measure/985. Relation between expectation interest and consequential loss.

**985. Relation between expectation interest and consequential loss.**

Consequential loss is a chameleon phrase in the law of contract<sup>1</sup>. It may mean simply loss of profits<sup>2</sup> and refer solely to the innocent party's expectation interest. It may, however, also encompass forms of loss which are not readily explicable as either expectation or reliance losses<sup>3</sup>. An example is the contamination of a carrier's vessel by a shipment consigned in breach of the warranty that goods delivered for carriage are fit to be carried<sup>4</sup>.

1 As to its use within exclusion clauses or similar terms see PARAS 812 ante, 1021 note 4 post.

2 See PARA 812 ante.

3 See Treitel *The Law of Contract* (9th Edn, 1995) p 851 et seq. As to expectation loss see PARA 977 et seq ante; and as to reliance loss see PARA 987 et seq post.

4 Cf *The Giannis NK* [1998] 1 Lloyd's Rep 337, HL.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(v) The Expectation Measure/986. Relation of expectation loss to incidental loss.

### **986. Relation of expectation loss to incidental loss.**

Certain forms of loss, sometimes designated as incidental loss, are not readily assignable to the categories of expectation or reliance loss<sup>1</sup>. Examples are the administrative cost of buying a substitute article for the article delivered in breach<sup>2</sup>, or the general cost of managerial time expended in counteracting the breach<sup>3</sup>.

1 See Treitel *The Law of Contract* (9th Edn, 1995) p 851.

2 *Robert Stewart & Sons Ltd v Carapanayoti & Co Ltd* [1962] 1 All ER 418, [1962] 1 WLR 34; and see Treitel *The Law of Contract* (9th Edn, 1995) pp 851-852.

3 Cf *GK Serigraphics (a firm) v Dispro Ltd*, CA (Civil Division) 1975 G Transcript No 968. Taxes, customs duties or other imposts, descending on the innocent party by reason of the breach and recoverable by him in principle from the party in breach, may afford a further example: see *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, [1977] 3 All ER 1048, HL; *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128 at 138, CA, per Slade LJ. See also *Brook's Wharf and Bull Wharf Ltd v Goodman Brothers* [1937] 1 KB 534 (restitution).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(vi) Wasted Expenditure and Reliance Loss/987. Nature of reliance loss.

## (vi) Wasted Expenditure and Reliance Loss

### 987. Nature of reliance loss.

The innocent party can recover those losses which he incurred in reliance on the other party's due performance of the contract and which have been rendered futile by the breach<sup>1</sup>. Typical forms of such loss are the expenses incurred in preparation for the innocent party's own performance<sup>2</sup>. The recovery of reliance loss is alternative to the recovery of expectation loss<sup>3</sup> and is available at the election of the innocent party<sup>4</sup>. Its principal value lies in cases where an innocent party cannot prove with sufficient cogency the benefits which would have accrued to him had the contract been performed<sup>5</sup>. Where a breach of contract makes it impossible to prove or compute those benefits, the innocent party can claim instead for wasted sums laid out in the misplaced expectation that the contract would be performed, yielding sufficient gain to recoup that outlay<sup>6</sup>. The party in breach cannot avoid liability simply because a true valuation of the innocent party's expectation interest is rendered impossible by the breach<sup>7</sup>. In this context the expenditure incurred need not be reasonable<sup>8</sup>, though it must be have been directed towards performance<sup>9</sup> and satisfy the normal rules of remoteness<sup>10</sup>.

1 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, Aust HC; *Anglia Television v Reed*[1972] 1 QB 60, [1971] 3 All ER 690, CA; *C and P Haulage v Middleton*[1983] 3 All ER 94, [1983] 1 WLR 1461, CA; *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16, [1984] 3 All ER 298; *Cullinane v British 'Rema' Manufacturing Co Ltd*[1954] 1 QB 292 at 308, [1953] 2 All ER 1257 at 1264-1265, CA, per Jenkins LJ. Losses recoverable under this head could include wasted capital outlay on a machine which is incapable of performing its warranted function: *Cullinane v British 'Rema' Manufacturing Co* supra. They are not limited to expenditure incurred by the innocent party in performing his own obligations under the contract: see PARA 992 post. As to post-breach expenditure see PARA 993 post.

2 Such as materials bought or personnel engaged. However, other forms of reliance loss are not recoverable: see PARA 996 post.

3 *Cullinane v British 'Rema' Manufacturing Co Ltd*[1954] 1 QB 292, [1953] 2 All ER 1257, CA; but see PARAS 991-992 post.

4 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, Aust HC; *Anglia Television v Reed*[1972] 1 QB 60, [1971] 3 All ER 690, CA; *C and P Haulage v Middleton*[1983] 3 All ER 94, [1983] 1 WLR 1461, CA; *CCC Films (London) Ltd v Impact Quadrant Films Ltd*[1985] QB 16, [1984] 3 All ER 298; *Cullinane v British 'Rema' Manufacturing Co Ltd*[1954] 1 QB 292 at 308, [1953] 2 All ER 1257 at 1264-1265, CA, per Jenkins LJ.

5 *Molling & Co v Dean & Son Ltd* (1902) 18 TLR 217, DC; *Collins v Howard*[1949] 1 All ER 507, 65 TLR 188 (loss suffered through plaintiff's sale of shares to raise funds for investment in venture with defendant and later repurchase of equivalent shares when venture aborted by defendant's breach); *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, Aust HC; *Anglia Television v Reed*[1972] 1 QB 60, [1971] 3 All ER 690, CA.

6 Where performance of the contract would not in any event have assuaged his reliance expenditure, the innocent party is likely to succeed in a claim for that expenditure: see PARA 996 post.

7 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, Aust HC. It seems, however, that the innocent party can also claim his reliance loss where his inability to show what he would have gained from performance stems from causes other than the breach. But the reliance loss itself must have been caused by the breach and it seems that the burden of this rests on the innocent party.

8 See *Chitty on Contracts* (27th Edn, 1994) PARA 26-032 note 74.



9 See *Chitty on Contracts* (27th Edn, 1994) PARA 26-032 note 74.

10 See PARA 1015 et seq post.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(vi) Wasted Expenditure and Reliance Loss/988. Reliance loss distinguished from expectation loss.

### **988. Reliance loss distinguished from expectation loss.**

Reliance losses are essentially retrospective. They look back to the position which the innocent party occupied before the contractual promise was made (or to the position which he would have occupied had the promise never been made<sup>1</sup>) rather than forward to the position which the innocent party should have occupied had the promise been kept<sup>2</sup>. Being historical, they are often easier to prove than forms of expectation loss, such as loss of profits<sup>3</sup>. It is arguable, however, that the reliance loss is merely a presumed manifestation of the expectation loss, in that the law presumes that the innocent party's outlay or investment would have been recouped on performance<sup>4</sup>. An innocent party cannot recover both his reliance expenditure and his expected gain under the broken contract, at least where the former must have been incurred in order to gain the latter<sup>5</sup>. The innocent party cannot amalgamate a claim for reliance loss with one for expectation loss where the overall result is to duplicate the damages claimed, or claim them 'twice over'<sup>6</sup>.

1 See Burrows *Remedies for Torts and Breach of Contract* (2nd Edn, 1994) p 248.

2 *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292 at 308, [1953] 2 All ER 1257 at 1264-1265, CA, per Jenkins LJ.

3 See eg *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292, [1953] 2 All ER 1257, CA.

4 *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 104 ALR 1, Aust HC; and see Treitel 'Damages for Breach of Contract in the High Court of Australia' (1992) 108 LQR 226. The distinction may, however, be important if the contract expressly excludes recovery of damages for expectation loss: see *Bem Dis A Turk Ticaret S/A TR v International Agri Trade Co Ltd, The Selda* [1998] 1 Lloyd's Rep 416.

5 *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292, [1953] 2 All ER 1257, CA.

6 *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292, [1953] 2 All ER 1257, CA; and see PARA 991 post.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(vi) Wasted Expenditure and Reliance Loss/989. Bad bargain.

### 989. Bad bargain.

Subject to one qualification, the innocent party has an unfettered power of choice between expectation and reliance losses<sup>1</sup>. The solitary restraint arises where an innocent party has made a bad bargain, that is, a contract which would have been unprofitable to him if performed.

An innocent party cannot, by claiming reliance loss, put himself in a better position than if the contract had been fully performed<sup>2</sup>. Where performance of the contract (or conduct of some activity of which it formed an essential part<sup>3</sup>) would have been unprofitable to the innocent party, yielding no overall expectation of gain, the innocent party cannot escape the bad bargain by opting for his reliance expenditure<sup>4</sup>. Where the reliance costs exceed the benefits which would have accrued from performance, and would not have been fully recouped therefrom, the innocent party recovers those costs only to the extent of the expected gain. Put another way, the party in breach is entitled to deduct from the claim any sum which he can prove that the claimant would have lost had the contract been fully performed<sup>5</sup>; he has the privilege of reducing the claimant's recoverable outlay by as much as he can show that that party would have lost on full performance<sup>6</sup>. To disregard the unprofitability of the contract and award the full measure of outlay in such cases would confer a windfall on the claimant, cast the contract breaker as an insurer of his activities, increase the damages in proportion to the claimant's inefficiency in performance rather than in proportion to the gravity of the breach, and probably offend normal principles of causation<sup>7</sup>.

1 *Anglia Television v Reed* [1972] 1 QB 60, [1971] 3 All ER 690, CA; *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16, [1984] 3 All ER 298; *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292, [1953] 2 All ER 1257, CA. For older authority see *Pow v Davis* (1861) 1 B & S 220; cf *Suse v Pompe* (1860) 8 CBNS 538.

2 *C and P Haulage v Middleton* [1983] 3 All ER 94 at 98-100, [1983] 1 WLR 1461 at 1467-1468, CA, per Ackner LJ.

3 *C and P Haulage v Middleton* [1983] 3 All ER 94, [1983] 1 WLR 1461, CA; *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16, [1984] 3 All ER 298 (semble); and see *Chitty on Contracts* (27th Edn, 1994) PARA 26-033. The precise range of activity from which the innocent party's expected gains are to be measured will vary according to circumstances; in particular, the nature of the contract and of the business conducted by him. The general question is whether the innocent party would have recouped all expenditure incurred from his reliance on the contract from the value of the exploitation which he intended to make of the subject matter of the contract: see *Chitty on Contracts* (27th Edn, 1994) PARA 26-033.

4 *C and P Haulage v Middleton* [1983] 3 All ER 94, [1983] 1 WLR 1461, CA; *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16, [1984] 3 All ER 298; following *Bowlay Logging Ltd v Domtar Ltd* (1982) 135 DLR (3d) 179; *L Albert & Son v Armstrong Rubber Co* 178 F (2d) 182 (1949). Cf *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 104 ALR 1, Aust HC; and see PARAS 964, 988 ante. The burden of proof is on the party in breach: see PARA 990 post.

5 *C and P Haulage v Middleton* [1983] 3 All ER 94 at 99, [1983] 1 WLR 1461 at 1467, CA, per Ackner LJ; citing *L Albert & Son v Armstrong Rubber Co* 178 F (2d) 182 (1949).

6 *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16, [1984] 3 All ER 298.

7 *Bowlay Logging Ltd v Domtar Ltd* (1982) 135 DLR (3d) 179.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(vi) Wasted Expenditure and Reliance Loss/990. Burden of proof of reliance loss and 'bad bargain'.

#### **990. Burden of proof of reliance loss and 'bad bargain'.**

The innocent party is assisted in a claim for reliance loss by a favourable burden of proof. The innocent party bears the initial burden of proving that his expenditure or other loss was incurred on the faith of the other party's promise, and that that promise was broken<sup>1</sup>. Proof of both reliance loss and breach raises a *prima facie* case, from which a court will infer that the breach caused the loss. The party in breach must then show that the reliance costs (or any part of them) would not have been recouped, and would still have been wasted, had the contract been performed<sup>2</sup>. In short, the burden rests on the party in breach to show that the contract would not have been a profitable one for the innocent party for the purpose of debarring a claim for reliance loss. The difficulty of showing the overall value of a contract disrupted by breach justifies imposing the peril of showing unprofitability on the party who has, by his wrong, made the issue relevant to the rights of the innocent party<sup>3</sup>.

1 Cf *GK Serigraphics (a firm) v Dispro Ltd* (Civil Division) 1975 G Transcript No 968, CA (defendants in breach of contract to laminate boards for plaintiffs, who had planned to process the boards into coloured shapes and resell for use in schools; plaintiffs claimed as damages (*inter alia*) that proportion of the fixed costs of the depreciation of machinery, overheads, management and supervision relating to their business which was wasted by reason of the breach; defendants contested, on the ground that the claim should fail unless the plaintiffs proved affirmatively that the relevant aspects of the business, which were allegedly put into loss, would otherwise (but for the breach) have found and successfully completed profitable work). The Court of Appeal, rejecting the defence, held that it was for the defendants to prove that the plaintiffs would not have found and brought to completion sufficient profitable alternative work to recoup the costs in question: ie 'that some part of the organisation would not have been profitably used had it not been for the breach': per Cumming-Bruce LJ. The location of the onus on defendants was justified on grounds of commercial practicability (per Cumming-Bruce and Griffiths LJ) and (possibly) by the need to avoid oppression (per O'Connor LJ); the defendants had not sought to adduce the necessary evidence and the claim accordingly succeeded): see *GK Serigraphics (a firm) v Dispro Ltd* *supra*.

2 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, Aust HC; *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 104 ALR 1, Aust HC; cf *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, [1952] 1 All ER 796, CA; *Armory v Delamirie* (1722) 1 Stra 505.

3 *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16 at 40, [1984] 3 All ER 298 at 312 per Hutchison J.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(vi) Wasted Expenditure and Reliance Loss/991. Hybrid claims for both outlay and gain.

### 991. Hybrid claims for both outlay and gain.

An innocent party cannot ordinarily recover both expectation loss (such as loss of profit) and reliance loss (such as wasted capital expenditure). He has a choice between the two measures<sup>1</sup> but must, in general, opt for one or the other<sup>2</sup>. A claim for both outlay and gain seeking the cost of gaining contractual benefits along with the benefits themselves, involves a double counting<sup>3</sup>. To grant such a claim would offend the rule that damages are compensatory<sup>4</sup> and the rule that damages for expectation loss are to be assessed as if the contract had been performed<sup>5</sup>. Where, therefore, a working chattel fails to perform according to warranty, a claim for loss of profits cannot ordinarily be combined with a claim for the capital undervalue of the chattel<sup>6</sup>. The claim for lost profits must be assessed as if the chattel fulfilled the warranty, in which event the full contract price, and other costs necessary to use the chattel, would have been payable<sup>7</sup>. Such a claim could proceed only on the footing that the required capital expenditure had been incurred<sup>8</sup>.

<sup>1</sup> See PARA 987 ante.

<sup>2</sup> *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292, [1953] 2 All ER 1257, CA; *Re Daniel* [1917] 2 Ch 405; *Gee v Lancashire and Yorkshire Rly* (1860) 6 H & N 211; *Le Peintur v South Eastern Rly* (1860) 2 LT 170; *Wilson v Lancashire and Yorkshire Rly* (1861) 9 CB (NS) 632; *Woodger v Great Western Rly* (1867) LR 2 CP 318; *Candy v Midland Rly* (1878) 38 LT 226.

<sup>3</sup> *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292 at 308, [1953] 2 All ER 1257 at 1264-1265, CA, per Jenkins LJ.

<sup>4</sup> See PARA 941 ante.

<sup>5</sup> See PARA 977 ante.

<sup>6</sup> *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292, [1953] 2 All ER 1257, CA (buyers of underperforming machine could not recover, in addition to claim for three years' loss of profit from date of delivery to date of trial, amount by which capital value of machine on delivery fell short of value it would have had if warranty had been fulfilled, giving credit for this purpose for the residual value and the unpaid purchase price; claim not validated by fact that machine had estimated ten year life and loss of profits was not claimed over that whole period, or by fact that claimants made allowance for depreciation).

<sup>7</sup> *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292 at 308, [1953] 2 All ER 1257 at 1264, CA, per Jenkins LJ. Conversely, where the warranty relates to performance of a chattel and the buyer sues for loss of profit, no sum for depreciation of the chattel is to be deducted from the sum recoverable, because that would involve a double deduction: *Cullinane v British 'Rema' Manufacturing Co Ltd* supra at 303, 306 and 1261-1264, per Sir Raymond Evershed MR; discussed in *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 37 ALJR 289 at 293, Aust HC: 'We understand their Lordships to mean that in such a case the plaintiff, having paid for the machine at the beginning, should not have to pay for it a second time (in effect) by having its value, spread over the period of its life, subtracted from what otherwise would be his damages. The reason obviously is that where the plaintiff adopts, as the amount the machine would have been worth to him if it had been as warranted, the amount of the profits he would have made by using it to the point of exhausting its useful life, he is entitled to recover the whole amount of those profits, without making provision for the replacement of the cost of the machine; for those profits are what he was really buying when he bought the machine in reliance upon the warranty. But the same result may be produced by claiming for recoupment of his capital outlay and in addition for the excess of the estimated profits over the amount of the capital outlay; and that is all that is done by a plaintiff who claims his capital outlay and in addition profits estimated after deduction of depreciation'.

<sup>8</sup> *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292 at 303, [1953] 2 All ER 1257 at 1261, CA, per Sir Raymond Evershed MR.



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## 992. Claims for net profits.

The normal prohibition on hybrid claims<sup>1</sup>, being aimed at the avoidance of double counting, may not debar claims which seek no duplication of damages<sup>2</sup>. That may be so where a buyer of a working chattel seeks separate measures of loss for different phases in the notional life of the chattel and can prove that the overall net profit which would have been derived from a chattel conforming to warranty would have exceeded the total capital outlay<sup>3</sup>. A mixed claim for both capital expenditure and loss of profits, which seeks recoupment of the innocent party's capital outlay and the amount by which the estimated profits exceed the capital outlay, may therefore succeed, for it seeks only the net profits lost through the breach<sup>4</sup>. Net profits might be calculated by deducting from the gross return anticipated by the innocent party his personal costs of performance and necessary capital outlay minus any residual or salvage value in the capital asset<sup>5</sup>. The normal prohibition on hybrid claims might therefore be confined to those which demand gross profits or gross returns in addition to reliance costs<sup>6</sup>.

1 See PARA 991 ante.

2 *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 37 ALJR 289 at 293, Aust HC.

3 *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 37 ALJR 289 at 293, Aust HC; explaining *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292, [1953] 2 All ER 1257, CA, on the grounds that, in that case, the claimant had claimed loss of profit only for a period of three years out of the ten years' working life which the machine would have had if it had met the contract, and the majority of the Court of Appeal (Sir Raymond Evershed MR and Jenkins and Morris LJ dissenting on this point) concluded from the statement of claim that, if the machine had been as warranted, profits would have been earned for only three years; on that basis, the plaintiff had not shown that profits over the whole life would have exceeded his capital expenditure plus interest, and the official referee's additional award for loss of profit over the three years was disallowed; the decision does not, therefore, hold that in principle loss of profit can never be recovered in conjunction with a successful claim for wasted capital outlay.

4 See *Millar's Machinery Co Ltd v David Way & Son* (1935) 40 Com Cas 204. See also *Chitty on Contract* (27th Edn, 1994) PARA 41-314.

5 *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 37 ALJR 289, Aust HC (there is no objection to a claim for both capital outlay and the excess of the estimated profits over the amount of capital outlay; that, in essence, is what a claimant who claims both capital outlay and profits estimated after deduction of depreciation is seeking).

6 See further *Millar's Machinery Co Ltd v David Way & Son* (1935) 40 Com Cas 204 (buyer of non-conforming machinery recovered: (1) price; (2) wasted installation costs; and (3) net profits lost in consequence of breach. See also *Chitty on Contract* (27th Edn, 1994) PARA 41-314.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(vi) Wasted Expenditure and Reliance Loss/993. Reliance losses incurred after breach.

### 993. Reliance losses incurred after breach.

The general right to reliance loss includes those losses incurred by the innocent party in the aftermath of breach, whether by way of mitigation or otherwise<sup>1</sup>. Common examples of such loss are an innocent party's own liability to a third party, where a contract between the third party and the innocent party depended on the due performance of the contract in dispute<sup>2</sup>; and the cost to the innocent party of engaging a performer in substitution for the party in breach<sup>3</sup>. In distinction to the general principle governing the recovery of reliance loss<sup>4</sup>, expenditure of this nature is recoverable notwithstanding that the contract can be shown to have been unprofitable to the innocent party<sup>5</sup>. It is, however, subject to the normal principles of causation<sup>6</sup>, remoteness<sup>7</sup> and reasonableness<sup>8</sup>.

1 *Borries v Hutchinson* (1865) 18 CBNS 445; *Smith v Johnson* (1899) 15 TLR 179; *Watson v Gray* (1900) 16 TLR 308; *Richard Holden Ltd v Bostock & Co Ltd* (1902) 18 TLR 317, CA; *John M Henderson & Co Ltd v Montague L Meyer Ltd* (1941) 46 Com Cas 209; *Heskell v Continental Express Ltd* [1950] 1 All ER 1033; *SS Ardennes (Cargo Owners) v SS Ardennes (Owners)* [1951] 1 KB 55, [1950] 2 All ER 517; *Biggin v Permanite* [1951] 1 KB 422 at 436, [1950] 2 All ER 859 at 869 per Devlin J (revsd [1951] 2 KB 314, CA); *Harlow & Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep 509; *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225, CA; *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397; *Calabar Properties Ltd v Stitches* [1983] 3 All ER 759, [1984] 1 WLR 287.

2 *Biggin & Co Ltd v Permanite Ltd* [1951] 1 KB 422 at 436, [1950] 2 All ER 859 at 869 per Devlin J; revsd [1951] 2 KB 314, CA.

3 See generally *Tito v Waddell (No 2)* [1977] Ch 106 at 332, [1977] 3 All ER 129 at 316-317 per Megarry VC; *Radford v de Froberville* [1978] 1 All ER 33, [1977] 1 WLR 1262; *Jones v Herxheimer* [1950] 2 KB 106, [1950] 1 All ER 323, CA; cf *Wigzell v School for Indigent Blind* (1882) 8 QBD 357, DC.

4 See PARA 987 ante.

5 See *Chitty on Contract* (27th Edn, 1994) PARA 26-038.

6 See PARAS 1035-1040 post.

7 See PARAS 1015-1034 post.

8 See PARA 981 ante.



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#### **994. Reliance expenditure not directed at performance.**

Any loss which would not have been incurred by the innocent party had the contract not been made is in principle recoverable by way of reliance loss<sup>1</sup>. Such loss need not take the form of wasted expenditure, investment or outlay (though this is its commonest form). It need not be pecuniary and need not be directed towards the innocent party's performance of his own obligations under the contract<sup>2</sup>. The normal principles of remoteness of damage govern claims for reliance loss<sup>3</sup>, and apply to reliance losses within the present category, no less than to expense incurred in performance. Recovery under this category of reliance loss is also subject to the innocent party's obligation to mitigate<sup>4</sup> and (in common with reliance losses generally) is limited by the profitability of the contract in question<sup>5</sup>. Where the party in breach can show that the gross return accruing to the innocent party from performance<sup>6</sup> would not have exceeded all forms of expenditure by the innocent party, whether directed towards performance or not, recovery of that expenditure is correspondingly limited. It can be recovered only to the extent that it would have been recouped from performance of the contract itself<sup>7</sup>.

1 *Lloyd v Stanbury* [1971] 2 All ER 267, [1971] 1 WLR 535.

2 See eg *Steam Herring Fleet Ltd v VS Richards & Co Ltd* (1901) 17 TLR 731; *Richard Holden Ltd v Bostock & Co Ltd* (1902) 18 TLR 317, CA; *Molling & Co v Dean & Son Ltd* (1902) 18 TLR 217, DC; *British Westinghouse Co v Underground Electric Rlys* [1912] AC 673, HL; *Saint Line Ltd v Richardsons Westgarth & Co Ltd* [1940] 2 KB 99, [1945] 2 All ER 134; *Mason v Birmingham* [1949] 2 KB 545, [1949] 2 All ER 134, CA; *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292, [1953] 2 All ER 1257, CA.

3 See PARAS 995, 1015 et seq post.

4 See PARA 1041 et seq post.

5 See PARA 987 et seq ante.

6 See *C and P Haulage v Middleton* [1983] 3 All ER 94, [1983] 1 WLR 1461, CA; *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292, [1953] 2 All ER 1257, CA.

7 *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16, [1984] 3 All ER 298; *C and P Haulage v Middleton* [1983] 3 All ER 94, [1983] 1 WLR 1461, CA; and see *Chitty on Contracts* (27th Edn, 1994) PARA 26-035.

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**995. Remoteness.**

A claim for reliance loss must satisfy the normal principles of remoteness of damage<sup>1</sup>. In general terms, the innocent party must show that it was within the parties' reasonable contemplation that it was not unlikely that the innocent party would incur the cost in question in reliance on the contract and that that cost would be thrown away in the event of the breach which occurred<sup>2</sup>.

1 *Anglia Television v Reed* [1972] 1 QB 60 at 64, [1971] 3 All ER 690 at 692, CA, per Lord Denning MR; but cf *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791 at 801, [1978] 1 All ER 525 at 531, CA, per Lord Denning MR.

2 *Anglia Television v Reed* [1972] 1 QB 60, [1971] 3 All ER 690, CA. See also PARA 996 post.

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### 996. Pre-contract outlay.

Most cases of reliance loss involve an award of damages for losses incurred after the contract was made. This accords with the principle that loss must have been incurred in reliance on the due performance of the contract<sup>1</sup>. However, an innocent party can recover expenditure or other loss incurred before the contract was made where this consists of the legal costs of approving and executing the contract<sup>2</sup>, or the costs of performing an act required to be done by the contract, even though the act is done in anticipation of the contract<sup>3</sup>, or would reasonably have been in the contemplation of the parties as likely to be wasted if the contract were broken, and was wasted by reason of the breach<sup>4</sup>.

1 See PARA 987 ante.

2 *Lloyd v Stanbury* [1971] 2 All ER 267, [1971] 1 WLR 535.

3 See Burrows *Remedies for Tort and Breach of Contract* (2nd Edn, 1994) pp 254-255.

4 *Anglia Television v Reed* [1972] 1 QB 60, [1971] 3 All ER 690, CA; not following statements in *Perestrello e Compagnhia Ltda v United Paint Co Ltd* [1969] 3 All ER 479, CA (petition dismissed [1969] 1 WLR 580, HL); *Hodges v Litchfield* (1835) 1 Bing NC 492. In *Anglia Television v Reed* supra the plaintiffs recovered preparatory costs in the form of director's and designer's fees, location etc, for the filming of a television play from the defendant actor who, after the costs were incurred, first contracted to play the leading role but later repudiated the contract. Lord Denning MR (at 64 and 692) held that recovery was justified because (1) the defendant must have known that much expense had already been incurred before he made the contract and must have (or can reasonably be taken to have) contemplated that those expenses would be wasted if he broke his contract, whether they were incurred before or after the contract itself; and (2) it was because of the breach that the expenditure had been wasted. The latter point is significant on the matter of causation (as to which see generally paras 1035-1040 post). The objection that the breach cannot be said to have caused the loss in cases of pre-contract outlay is presumably met (on appropriate facts) by concluding that, had the party in breach never made the contract, the innocent party would have recouped its outlay by making another contract with another party, while if the party in breach had not repudiated the contract, the innocent party would have recouped its outlay by bringing the instant contract to fruition. It may well be that, having regard to more recent developments of the 'bad bargain' principle (see PARA 989 ante), these are matters of presumption in favour of the innocent party, to be rebutted by the party in breach. In other cases, the recovery of damages in the form of pre-contract expenditure may be justified by construing the contract, once made, as retrospective in effect, relating back to and governing the parties' relations from a time before the contract was made. It has been suggested that the party in breach should begin to be liable for pre-contract expenditure, which he knows that the innocent party plans to recoup from the performance of the contract, from the moment the contract is substantially concluded: see further Burrows *Remedies for Torts and Breach of Contract* (2nd Edn, 1994) pp 254-256.

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## **(vii) Restitutionary Interest**

### **997. Restitution and damages.**

Money awards made in support of the restitutionary interest are not traditionally termed awards of damages, because the object of such an award is not to compensate the innocent party for a loss, but rather to deprive the other party of the benefit gained by breach<sup>1</sup>. This is the ground on which restitutionary awards are conventionally distinguished from awards of damages based on reliance loss<sup>2</sup>. While both types of award may originate from outlay made by the innocent party in reliance on the contract, an award for reliance loss is loss-related and compensatory, and may not be made where the claimant is shown to have made a bad bargain<sup>3</sup>, whereas a restitutionary award may issue irrespective of loss, whether or not the contract would have been unprofitable to the innocent party if performed<sup>4</sup>. A restitutionary award can also be distinguished from an award compensating for loss of the expectation interest, in that an innocent party does not ordinarily contemplate that the contract will be broken and the fruits disgorged to him, or that he will occupy the same position on performance of the contract as he occupied before performance<sup>5</sup>. Occasionally, however, a restitutionary award may be included within an award of general damages<sup>6</sup>.

1 *Jaggard v Sawyer*[1995] 2 All ER 189 at 196-197, [1995] 1 WLR 269 at 276, CA, per Sir Thomas Bingham MR; *Surrey County Council v Bredero Homes Ltd*[1993] 3 All ER 705 at 709, [1993] 1 WLR 1361 at 1364, CA, per Dillon LJ; *A-G v Blake (Jonathan Cape)*[1998] 1 All ER 833 at 846, [1998] 2 WLR 805 at 818-819, CA, per Lord Woolf MR.

2 See also *Surrey County Council v Bredero Homes Ltd*[1993] 3 All ER 705 at 714, [1993] 1 WLR 1361 at 1369, CA, per Steyn LJ.

3 See PARA 989 ante. Unlike the position with respect to reliance loss, an innocent party is not debarred from exercising a right of restitution merely on the ground that such a remedy will put him in a better position than that which he would have occupied had the contract been performed: Treitel *The Law of Contract* (9th Edn, 1995) p 849.

4 See *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*[1952] 2 QB 246 at 254-255, [1952] 1 All ER 796 at 800-801, CA, per Denning LJ. See also Burrows *Remedies for Tort and Breach of Contract* (2nd Edn, 1994) pp 294-299.

5 Cf *Surrey County Council v Bredero Homes Ltd*[1993] 3 All ER 705 at 714, [1993] 1 WLR 1361 at 1369, CA, per Steyn LJ.

6 *Aerial Advertising Co v Batchelors Peas Ltd (Manchester)*[1938] 2 All ER 788, 82 Sol Jo 567 (money paid by plaintiff to defendant lost owing to defendant's breach, included as part of general award of damages).

## **UPDATE**

### **997 Restitution and damages**

NOTE 1--*A-G v Blake*, cited, reversed in part: [2000] 4 All ER 385, [2000] 3 WLR 625, HL.

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### 998. Fruits of breach not generally disgorged.

An innocent party cannot normally compel a party in breach to disgorge either profits<sup>1</sup> or savings<sup>2</sup> derived from the breach where those profits or savings are not reflected in a loss to the innocent party<sup>3</sup>. A contrary rule would offend the compensatory role of damages for breach of contract<sup>4</sup>, and compensation remains the principal object of a monetary award against a party in breach<sup>5</sup>. The general rule is, however, affected by two modern developments<sup>6</sup>. The first is an increasingly liberal definition of loss<sup>7</sup> and the second is the growth of exceptions to this normal rule<sup>8</sup>. In neither area are the applicable principles settled. Certain awards are variously classed as compensatory or as restitutionary<sup>9</sup> and certain exceptions to the compensation principle have only tentative support<sup>10</sup>.

1 *Teacher v Calder* (1899) 1 F 39, HL.

2 *Tito v Waddell (No 2)* [1977] Ch 106 at 332, [1977] 3 All ER 129 at 316 per Megarry VC; *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] NLJR 1504, (1995) Times, 21 July, CA (where innocent party contracted with party in breach to receive latter's 'de luxe' service but in fact got only the 'standard' service, the innocent party was held entitled in principle to recover only the difference in value between the service promised and the service supplied, and not the savings which accrued to the party in breach from performance at the lower level; by claiming those economies, the innocent party was essentially claiming for total failure of consideration, and there was no such failure here; plaintiff recovered only nominal damages as difference in value measure was not pleaded). See also Beale 'Damages For Poor Service' (1996) 112 LQR 205, discussing some of the difficulties in quantifying loss of value in such cases. See further *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL; cf *DO Ferguson & Associates v M Sohl* (1992) 62 BLR 95, CA (builder sued employer for sums alleged to be owing under contract; employer counterclaimed for damages and restitution of payments made; held, builder was in breach but liable only to nominal damages; there had been a total failure of consideration and a sum calculated by deducting the amount paid less the value of the work performed ordered); see further PARA 946 note 3 ante.

3 *Teacher v Calder* [1899] AC 451, HL; *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833, [1998] 2 WLR 805, CA; *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705, [1993] 1 WLR 1361, CA; cf *Moses v Macferlan* (1760) 2 Burr 1005; *Reid-Newfoundland Co v Anglo-American Telegraph Co Ltd* [1912] AC 555, PC; *British Motor Trade Association v Gilbert* [1951] 2 All ER 641, [1951] WN 454; *Tito v Waddell (No 2)* [1977] Ch 106, [1977] 3 All ER 129; *Radford v de Froberville* [1978] 1 All ER 33, [1977] 1 WLR 1262. See also Birks 'Restitutionary Damages for Breach of Contract: Snapp and the Fusion of Law and Equity' [1987] LMCLQ 421.

4 *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 712-713, [1993] 1 WLR 1361 at 1367-1368, CA, per Dillon LJ; *Tito v Waddell (No 2)* [1977] Ch 106 at 332, [1977] 3 All ER 129 at 316 per Megarry VC. Conversely, the existence of exceptions to the general compensatory rule does not threaten the integrity of the rule itself: *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833 at 844-845, [1998] 2 WLR 805 at 816-817, CA, per Lord Woolf MR.

5 *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833, [1998] 2 WLR 805, CA.

6 See Friedman 'Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong' (1980) 80 Col LR 504; Jones 'The Recovery of Benefits gained from a Breach of Contract' (1983) 99 LQR 443; Birks 'Restitutionary Damages for Breach of Contract: Snapp and the Fusion of Law and Equity' [1987] LMCLQ 421; Jackman 'Restitution for Wrongs' (1989) 48 CLJ 302; Birks 'Profits of Breach of Contract' (1993) 109 LQR 518; Burrows 'No Restitutionary Damages for Breach of Contract' [1993] LMCLQ 453; Beatson *The Use and Abuse of Unjust Enrichment* (1991) pp 15-17; Goff and Jones *The Law of Restitution* (4th Edn, 1993) pp 397-403, 412-417; and Burrows *Remedies for Torts and Breach of Contract* (2nd Edn, 1994) pp 307-314.

7 See eg *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 96-97, [1993] 3 All ER 417 at 421-422, HL, per Lord Griffiths; *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 906-907, [1995] 1 WLR 68 at 79-80, CA, per Steyn LJ; *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46 at 93, (1998) Times, 11 February, CA, per Evans LJ.

8 See PARA 1008 post.

9 See *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705, [1993] 1 WLR 1361, CA; *Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA; *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833, [1998] 2 WLR 805, CA.

10 See eg *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833, [1998] 2 WLR 805, CA.

## **UPDATE**

### **998 Fruits of breach not generally disgorged**

NOTES--*A-G v Blake*, cited, reversed in part: [2000] 4 All ER 385, [2000] 3 WLR 625, HL (in exceptional cases the court may require a defendant to account for profits received from breach of contract).

NOTE 7--*Alfred McAlpine Construction*, cited, reversed: [2000] 4 All ER 97, HL.

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### 999. Loss.

Where a person is in breach of a covenant not to build on another's land, damages for breach of covenant (or for trespass) can be awarded to represent the putative cost to the party in breach of obtaining the grant of a right of way, or the waiver of the covenant<sup>1</sup>. Such an award is compensatory, and correctly termed an award of damages in the strictest sense<sup>2</sup>, rather than restitutionary<sup>3</sup>. A compensatory award may also issue where a party acting in breach of a covenant to build no more than a stipulated number of houses on land owned by him makes a profit by exceeding the stipulation<sup>4</sup>, at least where the innocent party has been expeditious in seeking equitable relief but the court declines to prevent commission of a future wrong<sup>5</sup>. In those events the innocent party suffers a loss through being deprived of something of value which he formerly had, namely the right to demand payment for the doing of the covenantor's act of contravention<sup>6</sup>. A compensatory analysis is therefore appropriate<sup>7</sup>.

1 *Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA. As to breach of covenant see EQUITY vol 16(2) (Reissue) PARA 613 et seq. As to trespass see TORT.

2 Cf para 947 ante.

3 *Jaggard v Sawyer* [1995] 2 All ER 189 at 201-202, [1995] 1 WLR 269 at 281, CA, per Sir Thomas Bingham MR.

4 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798 as analysed in *Jaggard v Sawyer* [1995] 2 All ER 189 at 201-202, [1995] 1 WLR 269 at 281-282, CA, per Sir Thomas Bingham MR, and at 291-292 per Millett LJ (plaintiffs awarded 5% of the reasonably anticipated profits of the defendants) disapproving the restitutionary analysis of such damages by Steyn LJ in *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705, [1993] 1 WLR 1361, CA. But cf Lord Woolf MR in *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833 at 844-845, [1998] 2 WLR 805 at 817-818, CA, who appears to prefer a restitutionary analysis of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* supra.

5 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798; cf *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 716, [1993] 1 WLR 1361 at 1371, CA, per Rose LJ.

6 *Jaggard v Sawyer* [1995] 2 All ER 189 at 201-202, [1995] 1 WLR 269 at 281-282, CA, per Sir Thomas Bingham MR; following *Tito v Waddell (No 2)* [1977] Ch 106, [1977] 3 All ER 129; and not following *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705, [1993] 1 WLR 1361, CA, per Steyn LJ. See also *Jaggard v Sawyer* [1995] 2 All ER 189 at 210-211, [1995] 1 WLR 269 at 291-292, CA, per Millett LJ; *Bracewell v Appleby* [1975] Ch 408, [1975] 1 All ER 993. In *Jaggard v Sawyer* supra at 210 and 291, Millett LJ observed that the prima facie measure of damages for breach of a covenant not to build on neighbouring land is the diminution in the value of the land; that an important factor in assessing the pre-breach value of the land is the covenantee's ability to get an injunction restraining the breach because such ability clearly affects the covenantor's willingness to pay for the right to build; that *Surrey County Council v Bredero Homes Ltd* supra (a case of a nominal award) might be distinguished on this ground, inter alia because the covenantee had (by delaying the start of proceedings until the covenantor was no longer susceptible to an injunction) deprived itself of any bargaining leverage; and that accordingly, while damages are in principle awardable at common law whenever a covenantee builds in breach of a covenant, in practice they will be awarded only in circumstances where they could also be awarded under Lord Cairns's Act (see PARA 942 ante). In other circumstances only nominal damages will issue unless the covenantee can establish a claim to 'damages in accordance with restitutionary principles'. Note further the requirements which apply to the recovery of damages for a loss of opportunity, which rules would presumably apply to a loss of bargaining opportunity in cases of this nature: see PARA 962 et seq ante.

7 *Jaggard v Sawyer* [1995] 2 All ER 189 at 201-202, [1995] 1 WLR 269 at 281-282, CA, per Sir Thomas Bingham MR. But cf *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833 at 844-845, [1998] 2 WLR 805 at 816-817, CA, per Lord Woolf MR.

### UPDATE

**999 Loss**

NOTES 4, 7--*A-G v Blake*, cited, reversed in part: [2000] 4 All ER 385, [2000] 3 WLR 625, HL



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### 1000. Restitution by way of exception.

Modern law is sufficiently mature to admit restitutionary claims for breach-derived gains in exceptional cases<sup>1</sup>. These exceptions do not subvert the cardinal principle that damages are compensatory<sup>2</sup> but show that it is not absolute<sup>3</sup>. Where a compensatory award for damages would be inadequate<sup>4</sup>, a restitutionary award as to the profits or economies derived from breach can be made where the party in breach 'skimps' on the contract by failing to provide the full extent of the services he has undertaken to provide and for which he has received payment<sup>5</sup>, or obtains the profit by doing the very thing which he has contracted not to do<sup>6</sup>, or by acting in breach of confidence or in breach of a fiduciary obligation<sup>7</sup>. Further ground for a restitutionary award may exist where the innocent party acts expeditiously to arrest or protest against the breach, so preserving remedies in equity<sup>8</sup>. A restitutionary award may also be appropriate where the breach invades property rights<sup>9</sup>, as where financial relief is sought in lieu of a mandatory injunction requiring the demolition of buildings erected in breach of restrictive covenant and the value of the covenantee's land is not diminished by the breach<sup>10</sup>. However, restitution cannot be ordered merely on the ground that the breach is opportunistic or self-serving and is committed deliberately or cynically to enable the contract breaker to conclude a more lucrative contract (or to engage in more lucrative conduct) elsewhere<sup>11</sup>. Nor can the restitution of profits or savings be ordered merely because alternative (and discretionary) relief in equity to restrain or reverse the breach was available to the innocent party<sup>12</sup>.

1 *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833 at 845, [1998] 2 WLR 805 at 817, CA, per Lord Woolf MR. As to restitution generally see RESTITUTION.

2 *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833 at 844-845, [1998] 2 WLR 805 at 816-817, CA, per Lord Woolf MR.

3 Similarly for tort and for bailment: see PARAS 900-902 ante, 1089 post.

4 *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833, [1998] 2 WLR 805, CA.

5 *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833 at 844-846, [1998] 2 WLR 805 at 816-818, CA, per Lord Woolf MR, who further remarked that if a compensatory rationale were needed, loss might even be gauged according to the amount by which the innocent party has been overcharged. Recent decisions of both the Court of Appeal (*Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705, [1993] 1 WLR 1361, CA; *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] NLJR 1504, (1995) Times, 21 July, CA) and the House of Lords (*Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL) do little to encourage the pursuit of restitution for deliberate savings, though in neither of the last two cases were such damages specifically claimed. See further Coote 'Contract Damages: 'Ruxley' and the Performance Interest' [1997] CLJ 537 at 564.

6 *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833 at 844-846, [1998] 2 WLR 805 at 816-818, CA, per Lord Woolf MR, who believed that Birks 'Restitutionary Damages for Breach of Contract: 'Snepp' and the Fusion of Law and Equity' [1987] Lloyd's MCLQ 421 at 434 was correct in advocating the restitution of profits from a defendant who breaks a promise not to pursue a particular profit-making activity. That, Lord Woolf MR believed, was precisely the case in the present proceedings, where the gains were 'attributable to the interest infringed' in that the defendant 'earned the profits by doing the very thing which he had promised not to do'. Lord Woolf MR further observed that both this and the foregoing exception are instances where the breach does not merely afford the defendant the opportunity to make the impugned profits but directly occasions them; and both are instances where compensatory damages are an inadequate remedy 'if regard is paid to the objects which the plaintiff sought to achieve by the contract'.

7 *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 715, [1993] 1 WLR 1361 at 1370, CA, per Steyn LJ; *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833 at 846, [1998] 2 WLR 805 at 818, CA, per Lord

Woolf MR. Had the making of an order in restitution consequent on breach of contract been open to him, Lord Woolf MR would provisionally have favoured a direct award of restitutionary damages rather than the invocation of a remedial constructive trust, with its potential consequent distortion of equitable concepts. In that respect he declined to endorse the route taken in the factually comparable American decision in *Snepp v United States* 444 US 507 (1980). But this question, like that of liability, was academic in view of the Attorney General's decision not to proceed with a contract claim.

8 *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 716, [1993] 1 WLR 1361 at 1371, CA, per Rose LJ.

9 Cf *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 714, [1993] 1 WLR 1361 at 1369, CA, per Steyn LJ (no such invasion).

10 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798, explained as a restitutionary case involving invasion of property rights in *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 714, [1993] 1 WLR 1361 at 1369, CA, per Steyn LJ (himself relying on Megarry VC in *Tito v Waddell (No 2)* [1977] Ch 106, [1977] 3 All ER 129). In *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* supra Brightman J at 341 and 815-816 said in dealing with the problem of what damages ought to be awarded to the plaintiffs in place of mandatory injunctions: '... the general rule would be to measure damages by reference to that sum which would place the plaintiffs in the same position as if the covenant had not been broken ... In my judgment a just substitute for a mandatory injunction would be such a sum of money as might reasonably have been demanded by the plaintiffs as a quid pro quo for relaxing the covenant'. Steyn LJ's analysis was disapproved by Sir Thomas Bingham MR at 201-202 and 281-282. See also *Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA. Cf Dillon LJ in *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 711-712, [1993] 1 WLR 1361 at 1366-1367, CA, who explained *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* supra as a case of equitable damages; and Rose LJ in *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 716, [1993] 1 WLR 1361 at 1371, CA.

11 *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705, [1993] 1 WLR 1361, CA. This would offend both the normal irrelevance attached to motive and the need for certainty in the assessment of contract damages; it could further discourage desirable economic activity and lead to an inflation of insurance costs: *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 715, [1993] 1 WLR 1361 at 1370, CA, per Steyn LJ.

12 *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705 at 715, [1993] 1 WLR 1361 at 1370, CA, per Steyn LJ. See also *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 3 All ER 394, [1988] 1 WLR 1406, CA.

## UPDATE

### 1000 Restitution by way of exception

NOTES 1-7--*A-G v Blake*, cited, affirmed on this point: [2000] 4 All ER 385, [2000] 3 WLR 625, HL (where the court considers it just, a defendant may be ordered to account to the innocent party for the profits arising from his breach of contract).

NOTE 10--See also *WWF-World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 All ER 74.

NOTE 12--See also *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2008] EWCA Civ 1086, [2009] Ch 390, [2009] 3 All ER 27 (restitutionary award not available as authorities precluded claim for non-proprietary tort).

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## **(viii) Damages Exceeding Loss: Extra-Compensatory Awards**

### **A. IN GENERAL**

#### **1001. Introduction.**

In several instances damages may be awarded which exceed the claimant's loss. Actions in tort<sup>1</sup> and in bailment<sup>2</sup> allow fairly liberal resort to extra-compensatory awards<sup>3</sup>, but even actions for breach of contract may depart from the compensatory principle<sup>4</sup>. To an extent, the law is uncertain in this area, both because judicial definitions of loss are not uniform, and because authorities differ as to whether certain subjects of award are compensatory or restitutionary in nature. An example of this discord is the reversal of benefits gained from breach of contract<sup>5</sup>.

1 Eg exemplary damages: see PARA 811 ante.

2 See generally paras 1088-1108 post.

3 See the examples in *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero*[1977] AC 774 at 846, [1976] 3 All ER 129 at 136-137, HL, per Lord Diplock.

4 As to the compensatory function of damages in contract see PARA 941 ante.

5 See PARA 1006 ante.

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## **B. LORD GRIFFITHS'S PRINCIPLE**

### **1002. Identity of owner or payer irrelevant.**

In an action for breach of contract, an employer under a building contract who complains of defective work may recover from the contractor substantial damages to reflect the cost of reinstatement or diminution in value<sup>1</sup>, even though the employer does not own the premises at the date of the breach<sup>2</sup>, or personally bear the cost of correcting the defects<sup>3</sup>, or personally suffer the relevant diminution in value<sup>4</sup>, provided that this result was intended by the parties, or was within their contemplation, on making the contract<sup>5</sup>. If the required intention or contemplation is shown<sup>6</sup>, it is immaterial that the true payer or sufferer is a stranger to the original contract<sup>7</sup>, such as a subsequent purchaser who acquired the property before breach<sup>8</sup>, or a relation of the employer who has no agency relationship with him<sup>9</sup>. Liability for substantial damages is not displaced merely because the innocent party did not own the building at the time of the breach<sup>10</sup>, or because some stranger to the contract has borne the loss without recourse to the employer<sup>11</sup>. Where parties to a contract intend or contemplate that substantial damages will be recovered, such matters do not qualify the liability of the party in breach<sup>12</sup>.

1 As to the appropriate measure of recovery (repair or diminution) in a given case see *Ruxley Electronics & Construction Ltd v Forsyth*[1996] AC 344, [1995] 3 All ER 268, HL. In a building contract, the recoverable substantial damages are the cost of reinstatement or diminution in value (whichever is the more reasonable to adopt in the circumstances) plus in appropriate cases a sum for loss of amenity.

2 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL; cf *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero*[1977] AC 774, [1976] 3 All ER 129, HL; distinguished in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* supra by Lord Browne-Wilkinson at 111-113 and 434-436 and by Lord Griffiths at 97 and 422.

3 See eg *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*[1994] 1 AC 85, [1993] 3 All ER 417, HL.

4 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*[1994] 1 AC 85 at 97, [1993] 3 All ER 417 at 422, HL, per Lord Griffiths.

5 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA; but cf *White v Jones*[1995] 2 AC 207 at 268, [1995] 1 All ER 691 at 710, HL, per Lord Goff of Chieveley.

6 The burden of proof is on the party asserting the right to substantial damages: *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

7 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 97, [1993] 3 All ER 417 at 422, HL, per Lord Griffiths who relied on *Jones v Stroud DC*[1988] 1 All ER 5, [1986] 1 WLR 1141, CA, holding it immaterial that *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* supra was a contract case whereas *Jones v Stroud DC* supra was a case of tort.

8 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*[1994] 1 AC 85, [1993] 3 All ER 417, HL, where a purported assignment of the contract itself failed because it was prohibited by the contract.

9 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 96-97, [1993] 3 All ER 417 at 421-422, HL, per Lord Griffiths (husband making contract for work on property owned by wife, but not as agent of wife).

10 Or indeed at any time: *Darlington Borough Council v Wiltshier Northern Ltd*[1995] 3 All ER 895, [1995] 1 WLR 68, CA; *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

11 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 97, [1993] 3 All ER 417 at 422, HL, per Griffiths.

12 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

## **UPDATE**

### **1002 Identity of owner or payer irrelevant**

NOTES--*Alfred McAlpine*, cited, reversed: [2000] 4 All ER 97, HL (employer may only recover substantial damages where no direct remedy between site owner and contractor).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(viii) Damages Exceeding Loss: Extra-Compensatory Awards/B. LORD GRIFFITHS'S PRINCIPLE/1003. Universality of principle.

### **1003. Universality of principle.**

The rule expressed in regard to building contracts<sup>1</sup> derives from classic contract theory<sup>2</sup> and reflects a general principle of contract law<sup>3</sup> applicable to contracts for services at large<sup>4</sup>. The identity of the true bearer of a loss<sup>5</sup> is immaterial in defining a contract breaker's liability to the innocent party<sup>6</sup>, provided that both contract breaker and innocent party intended or contemplated that the innocent party would recover substantial damages in the events which occurred<sup>7</sup>. Such intention may exist notwithstanding the existence of some independent collateral legal relation between the party in breach and the true payer or sufferer<sup>8</sup>. Whether such a relation affects the innocent party's right to substantial damages depends on whether the parties intended that it would<sup>9</sup>.

1 See PARA 1002 ante.

2 *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 907-908, [1995] 1 WLR 68 at 80, CA, per Steyn LJ.

3 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

4 See PARA 1004; and Coote 'Contract Damages: 'Ruxley' and the Performance Interest' [1997] CLJ 537 at 551-552.

5 That is, the fact that the true payer or sufferer is a stranger to the disputed contract.

6 This is because that payment or suffering is merely 'res inter alios acta'.

7 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

8 *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA; *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA; but cf *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 114-115, [1993] 3 All ER 417 at 436-437, HL, per Lord Browne-Wilkinson; *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL.

9 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA; but cf *White v Jones* [1995] 2 AC 207 at 268, [1995] 1 All ER 691 at 710, HL, per Lord Goff of Chieveley.

### **UPDATE**

### **1003 Universality of principle**

NOTES--*Alfred McAlpine*, cited, reversed: [2000] 4 All ER 97, HL (existence of duty of care deed, which provided site owner with direct remedy against contractor, fatal to claim for substantial damages by innocent party who was not true loss sufferer).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(viii) Damages Exceeding Loss: Extra-Compensatory Awards/C. AGREED SUBSTANTIAL RECOVERY/1004. Uniting diverse cases; the principle of agreed substantial recovery.

### **C. AGREED SUBSTANTIAL RECOVERY**

#### **1004. Uniting diverse cases; the principle of agreed substantial recovery.**

The principle that an innocent party's right to substantial damages depends on the intention or contemplation of the parties<sup>1</sup> affords a unifying rationale for those factually diverse cases where a party to a contract involving real<sup>2</sup> or personal<sup>3</sup> property, who has no interest in the property when the breach occurs<sup>4</sup> and suffers no apparent personal loss from the breach<sup>5</sup>, recovers substantial damages<sup>6</sup>. The principle appears to govern all contracts for the supply of services<sup>7</sup> except perhaps contracts of carriage<sup>8</sup>, where its application may depend on special facts<sup>9</sup>. It may also govern contracts for the sale of goods<sup>10</sup>, where damages are partially defined by statute<sup>11</sup>.

1 See PARA 1003 ante.

2 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL; *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA; *L/M International Construction Inc (now Bovis International Inc) v The Circle Ltd Partnership* (1995) 49 ConLR 12, [1995] NPC 128, CA; *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

3 *Dunlop v Lambert* (1839) 6 Cl & Fin 600, as explained in *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 846-847, [1976] 3 All ER 129 at 137-138, HL; *The Winkfield* [1902] P 42, CA.

4 Or at any time: *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA; *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

5 See eg *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL, but note that there both Lord Browne-Wilkinson at 111-112 and 434435 and Lord Griffiths at 97 and 422 described the loss as one suffered personally by the innocent contracting party.

6 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA. These situations include contracts of insurance made by parties other than owners, contracts for the carriage of goods where property changes hands during transit, and building contracts which are made by a party other than the owner of the premises, or by an owner who later assigns his interest elsewhere.

7 Eg work and labour on personal property.

8 Cf *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL.

9 See *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL; distinguished in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 97, [1993] 3 All ER 417 at 422, HL, per Lord Griffiths, and at 101 and 425 per Lord Browne-Wilkinson.

10 Especially claims for breach of warranty of quality: see *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA, per Evans LJ, which seeks to reconcile *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA, and *Slater v Hoyle & Smith* [1920] 2 KB 11, CA, on this ground. See also *Williams Bros v Ed T Agius Ltd* [1914] AC 510, HL; and PARA 1056 post.

11 See the Sale of Goods Act 1979 s 53; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 307 et seq.

### **UPDATE**

#### **1004 Uniting diverse cases; the principle of agreed substantial recovery**

NOTES--*Alfred McAlpine*, cited, reversed: [2000] 4 All ER 97, HL (party to contract who suffered no loss from breach of contract could only recover substantial damages where true loss sufferer had no direct remedy himself).

Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(1) GENERAL MEASURE/(viii) Damages Exceeding Loss: Extra-Compensatory Awards/C. AGREED SUBSTANTIAL RECOVERY/1005. Destination of proceeds; recovery for third party.

### **1005. Destination of proceeds; recovery for third party.**

Damages recovered by a non-owner of property under the principle of agreed substantial recovery<sup>1</sup> are held for the account of the owner of the property or other party who suffers the true loss<sup>2</sup>. That person can recover them from the innocent contracting party by means of a common law action for money had and received<sup>3</sup>. The obligation to account to the true owner or sufferer rescues the intended measure of damages from the rule against penalties<sup>4</sup>, in that the claimant retains no more than his true loss<sup>5</sup>. Where, however, substantial damages are awarded to an innocent party to compensate that party's own loss<sup>6</sup>, he may owe no duty to account to the true owner or sufferer<sup>7</sup>.

1 As to the principle of agreed substantial recovery see PARA 1004 ante.

2 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA. See also *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 114, [1993] 3 All ER 417 at 436, HL, per Lord Browne-Wilkinson.

3 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA, per Evans LJ; cf *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 114, [1993] 3 All ER 417 at 436, HL, per Lord Browne-Wilkinson; *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 902-903, [1995] 1 WLR 68 at 75, CA, per Dillon LJ.

4 As to penalty clauses see PARAS 1065, 1071, 1073 post.

5 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

6 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 97, [1993] 3 All ER 417 at 422, HL, per Lord Griffiths, and at 111-112 and 434-435 per Lord Browne-Wilkinson.

7 See PARA 1006 post.

## **UPDATE**

### **1005 Destination of proceeds; recovery for third party**

NOTES--*Alfred McAlpine*, cited, reversed on different grounds: [2000] 4 All ER 97, HL.

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**1006. Destination of proceeds; innocent party's own loss.**

There is support for the proposition that the innocent party's right to substantial damages from a contractual misperformer is a compensatory right which is designed to repair that party's personal loss<sup>1</sup>. The proposition derives principally from authorities which deny that the measure of damages recoverable by the innocent party offends the normal rule that damages are compensatory<sup>2</sup>. On this analysis, the innocent party's damages are awarded to compensate for his own financial loss because he has failed to get what he paid for<sup>3</sup>. If that be so, it may be inappropriate to impose an obligation to account to third parties.

1 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 97, [1993] 3 All ER 417 at 422, HL, per Lord Griffiths. It has been suggested that in consequence of this analysis, the innocent party cannot recover for consequential loss suffered by the true payer or sufferer: see Beale 'Privity of Contract: Judicial and Legislative Reform' (1995) 8 JCL 103 at 107; and Coote 'Contract Damages: 'Ruxley' and the Performance Interest' [1997] CLJ 537 at 551. This denial may extend to any distress or loss of enjoyment suffered peculiarly by that third party.

2 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 111-112, [1993] 3 All ER 417 at 434-435, HL, per Lord Browne-Wilkinson, and at 97 and 422 per Lord Griffiths.

3 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 97, [1993] 3 All ER 417 at 422, HL, per Lord Griffiths: 'In cases such as the present the person who places the contract has suffered financial loss because he has to spend money to give him the benefit of the bargain which the defendant had promised but failed to deliver'. See also at 111-112 and 434-435 per Lord Browne-Wilkinson, who agreed that the award was not one of extra-compensatory damages, and said that the proper measure of the commissioning party's loss in an action for breach of contract for the supply of work and/or materials (that is, normally, the difference in value between what has been supplied and what should have been supplied) is recoverable regardless of whether that party has any legal or equitable proprietary interest in the subject matter of the contract at the time of breach and regardless of whether he is out of pocket by virtue of the breach. But Lord Browne-Wilkinson appeared to accept that such damages were recovered on behalf of the true owner or sufferer, whereas Lord Griffiths made no reference to any onward destination. See also *White v Jones* [1995] 2 AC 207 at 281-282, [1995] 1 All ER 691 at 723-724, HL, per Lord Mustill.

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## **D. THE DUNLOP V LAMBERT PRINCIPLE**

### **1007. Commercial contracts concerning goods.**

A consignor who contracts with a carrier for the carriage of goods owned by the consignor at the time of the contract<sup>1</sup> cannot normally recover substantial damages for breach of the contract where property in the goods has passed to the consignee by the time of the breach and the consignee bears the real loss caused by the breach<sup>2</sup>. Recovery would offend the ordinary principle that damages are compensatory<sup>3</sup>. However, in a commercial contract concerning goods, where it is in the parties' contemplation that the proprietary interests in the goods may be transferred from one owner to another after the contract has been concluded and before a breach of that contract causes loss or damage to the goods, an original party to the contract is (if this is intended by both parties) to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before such loss or damage, and can recover as damages for breach of contract the actual loss sustained by those for whose benefit the contract was concluded<sup>4</sup>. This principle is a specific manifestation of the general principle of agreed substantial recovery<sup>5</sup>. Like the parent principle, it depends on the agreement, intention or contemplation of the contracting parties<sup>6</sup>.

1 Where the consignor is a seller of goods and the consignee the buyer, the consignor will normally make the contract of carriage as agent of the consignee, and will not be party to the contract of carriage: *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero*[1977] AC 774, [1976] 3 All ER 129, HL; and see CARRIAGE AND CARRIERS vol 7 (2008) PARA 753. The situation in the text will be exceptional.

2 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero*[1977] AC 774, [1976] 3 All ER 129, HL. It is assumed for this purpose that the consignor is not liable to the consignee (eg by way of refund of price) for what has occurred.

3 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero*[1977] AC 774, [1976] 3 All ER 129, HL.

4 *Dunlop v Lambert* (1839) 6 Cl & Fin 600, as explained in *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero*[1977] AC 774 at 847, [1976] 3 All ER 129 at 137, HL, per Lord Diplock.

5 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA. See also PARA 1004 ante.

6 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

## **UPDATE**

### **1007 Commercial contracts concerning goods**

NOTES 5, 6--*Alfred McAlpine*, cited, reversed: [2000] 4 All ER 97, HL.

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**1008. No obligation to sue.**

A stranger to the contract cannot compel the innocent contracting party to sue to enforce a right to substantial damages arising by reason of the *Dunlop v Lambert* principle<sup>1</sup>. Nor, of course, can a stranger who is not an assignee of the benefit of the contract, or a beneficiary under a trust, sue in person<sup>2</sup>.

<sup>1</sup> See the principle in *Dunlop v Lambert* (1839) 6 Cl & Fin 600: see PARA 1007 ante. See *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 847, [1976] 3 All ER 129 at 137, HL, per Lord Diplock; *White v Jones* [1995] 2 AC 207 at 267, [1995] 1 All ER 691 at 709, HL, per Lord Goff of Chieveley.

<sup>2</sup> Cf *L/M International Construction Inc (now Bovis International Inc) v The Circle Ltd Partnership* (1995) 49 ConLR 12, [1995] NPC 128, CA, where beneficial owners of land entered into a contract with a developer who in turn entered into a contract with management contractors. As security for certain finance, the developer assigned to the financier rights under the management contract. The financier was ultimately repaid (by a third party) and reassigned rights under the management contract back to the developer. The management contractors sued the developer for certain fees and costs. The developer sought to set-off and counterclaim in respect of sums due to it by the management contractors for breaches that took place while the contract was assigned to the financier. It was held that a developer who assigns by way of mortgage its interest in a management contract, and to whom the contract is later re-assigned on payment of the debt, can recover substantial damages for loss caused by breach of the management contract during the period of assignment, even though it was an absolute assignment and not by way of charge and even though the loss would be made good to the developer by a third party.

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### 1009. Contrary indications.

The shared intention or contemplation on which the *Dunlop v Lambert* principle<sup>1</sup> depends is unlikely to exist where parties to a contract of carriage contemplate that the carrier will make a separate contract of carriage with the party to whom property later passes<sup>2</sup>. The critical question, however, is not whether such a separate contract exists but whether the original contracting parties have expressly or impliedly agreed to the recovery of substantial damages<sup>3</sup>. In principle, an agreement that the innocent party should receive substantial damages may co-exist with some independent legal relation between the consignee and the party in breach<sup>4</sup>.

1    Ie the principle in *Dunlop v Lambert* (1839) 6 Cl & Fin 600: see PARA 1007 ante.

2    *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL; *a fortiori* where the contractual rights of a charterer under a charterparty are not identical with those of the bill of lading holder whose goods are lost or damaged. See also *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

3    *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA. In this case Evans LJ (for the Court) remarked that whereas the *Dunlop v Lambert* principle (see note 1 supra) can be described as an exception to the general rule prohibiting the recovery by one person of another person's loss, it can no less persuasively be described as supporting the general proposition that that 'compensatory' principle is subject to, and variable by, the parties' intention, whether that intention be express or implied.

4    Cf *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

## UPDATE

### 1009 Contrary indications

NOTES 2-4--*Alfred McAlpine*, cited, reversed [2000] 4 All ER 97, HL (innocent party may not recover substantial damages where independent legal relation provides true loss sufferer with direct remedy against party in breach).

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## **E. EXTENSION OF THE DUNLOP V LAMBERT PRINCIPLE**

### **1010. Application and extension.**

Courts have liberalised the range of circumstances in which an employer can recover substantial damages from a defaulting contractor. The *Dunlop v Lambert* principle<sup>1</sup> applies to building contracts<sup>2</sup> and has been extended to cases where: (1) the subject matter of the contract is real rather than personal property<sup>3</sup>; (2) the contract prohibits assignment of its benefit to third parties<sup>4</sup>; (3) no property passes during the life of the contract, the identity of the owner remaining constant<sup>5</sup>; and (5) the party in breach enters into direct legal relations with the owner or other party who bears the loss<sup>6</sup>. In all these circumstances substantial damages have been awarded because that was the intention of the parties<sup>7</sup>. The *Dunlop v Lambert* principle is a significant expression of the judicial desire to avoid the risk that transferred loss will be uncompensated<sup>8</sup>.

<sup>1</sup> See the principle in *Dunlop v Lambert* (1839) 6 Cl & Fin 600: see PARA 1007 ante.

<sup>2</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL; *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA. See also Palmer and Tolhurst 'Compensatory and Extra-Compensatory Damages: The Role of *'The Albazero'* in Modern Damages Claims' (1997) 12 JCL 1, 97.

<sup>3</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL; *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA; *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA; cf *L/M International Construction Inc (now Bovis International Inc) v The Circle Ltd Partnership* (1995) 49 ConLR 12, [1995] NPC 128, CA.

<sup>4</sup> Eg a buyer from the original contracting party: *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL. In *White v Jones* [1995] 2 AC 207 at 267, [1995] 1 All ER 691 at 709-710, HL, Lord Goff of Chieveley saw this as a case where there was no shared intention that the employer should be able to recover substantial damages for the benefit of the third party and where the recovery of such damages was sanctioned as a matter of law rather than as one of agreement; but cf *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

<sup>5</sup> *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA; *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

<sup>6</sup> *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA; *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

<sup>7</sup> *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA; cf *White v Jones* [1995] 2 AC 207 at 267, [1995] 1 All ER 691 at 708-709, HL, per Lord Goff of Chieveley. The *Dunlop v Lambert* principle, however, was not argued or applied (although both *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL, and *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA were referred to) in *L/M International Construction Inc (now Bovis International Inc) v The Circle Ltd Partnership* (1995) 49 ConLR 12, [1995] NPC 128, CA, a case where the owner of certain land entered into a contract with a developer who in turn entered into a management contract. The developer assigned absolutely its rights in the management contract to a financier. When the rights in the management contract were reassigned to the developer the question was raised whether the developer could sue the management contractor in respect of breaches occurring during the assignment even though the developer suffered no loss as any loss had been made good by the beneficial owner. According to Staughton LJ, the developer was allowed to recover substantial damages by analogy to the doctrine of the undisclosed principal, that is, an agent acting for an undisclosed principal may recover against a third party even though the agent has been reimbursed by the principal. He thought the developer was acting

in the capacity of agent even though it contracted personally and therefore could recover in respect of the loss that fell on it even though it was entitled to be reimbursed by the owner. Millett LJ thought that the management contractors' argument that the assignment and reassignment affected damages recoverable by the developer was defeated by two principles: (1) that a trustee of the benefit of a contract can sue for substantial damages even though the loss has been suffered by the beneficiary; and (2) that equity views a mortgagee as having only a security interest in the mortgaged property, even to the extent of allowing the mortgagor to sue for damage to the property without joining the mortgagee, whether or not the mortgagor was in possession. Thus if the assignee had sued during the assignment it would have held any damages on trust for the developer and since title was now revested in the assignor, the developer could recover for any loss suffered whether inflicted during the mortgage or not. *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* supra was also distinguished in *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481, 95 LGR 592, CA (defendant provided to the council faulty software which overstated the population of the community, with the result that the council set a lower community charge; the loss was made up for in the next year by a higher charge; the court held that this was not a recoverable loss as the constituents would have had to pay the amount in any case: the breach simply delayed that event); and in *Laing Management Ltd v Aegon Insurance Co (UK) Ltd* (1997) 86 BLR 70.

8 *White v Jones* [1995] 2 AC 207 at 268, [1995] 1 All ER 691 at 710, HL, per Lord Goff of Chieveley; and see also at 281-282 and at 723-724 per Lord Mustill who, without committing himself, accepted that both *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL and *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL, might conceivably afford isolated examples of recoverable transferred loss under English law.

## UPDATE

### 1010 Application and extension

NOTES 2-7--*Alfred McAlpine*, cited, reversed: [2000] 4 All ER 97, HL (employer may not recover substantial damages where independent legal relation provides true loss sufferer with direct remedy against party in breach).

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### **1011. Unlawful assignment; breach after transfer.**

An employer who, after making the building contract, alienates his interest in the property to a third party and (contrary to a contractual prohibition on assignment) purports to assign to the alienee the right to sue for breaches which occur after the attempted assignment<sup>1</sup> can recover substantial damages from the contractor when breach of the building contract leads to defective construction<sup>2</sup>. The recovery of such damages by the employer is not inhibited by the facts that the true loss is borne by the alienee (a stranger to the contract) or that the employer had (through his earlier alienation) no property in the building at the time of the contractor's breach<sup>3</sup>. The right may derive from agreement or common intention between employer and contractor<sup>4</sup>, or it may be imposed by law<sup>5</sup>.

1 The third party has no right of action in contract against the contractor because the right of action does not vest in the assignee independently of the validity of the assignment: *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 107-108, [1993] 3 All ER 417 at 431-432, HL, per Lord Browne-Wilkinson.

2 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL. The recoverable damages are the full cost of remedying the defects in the building or the diminution in value, whichever is the more reasonable and sensible measure to adopt, together in appropriate cases with a sum to represent loss of amenity (as to which see PARA 957 et seq ante).

3 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL, where it was held that a purported assignor who fails to create a valid assignment in favour of the third party is in breach of his contract with the third party and liable to him in damages. But the damages recoverable by the purported assignor from the contractor may not be the same as the damages recoverable by the third party from the purported assignor. The purported assignor cannot simply seek to recover from the contractor the precise sum of damages payable by the purported assignor to the third party, because these losses, being incurred in breach of the contract between the purported assignor and the contractor, are too remote to be recoverable. Of course, the third party will rarely, if ever, have a right of action in tort against the contractor: see generally NEGLIGENCE; TORT.

4 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

5 *White v Jones* [1995] 2 AC 207 at 267, [1995] 1 All ER 691 at 709, HL, per Lord Goff of Chieveley.

### **UPDATE**

### **1011 Unlawful assignment; breach after transfer**

NOTE 4--*Alfred McAlpine*, cited, reversed: [2000] 4 All ER 97, HL (employer may only recover substantial damages where no direct remedy between site owner and contractor).



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### **1012. No assignment; property constant.**

The right to substantial damages extends beyond cases where an employer's former ownership of the property ceases by the time of the contractor's breach. The principle in *Dunlop v Lambert*<sup>1</sup> allows an employer who had no legal relation with the property<sup>2</sup>, or whose relation with it never exceeded that of licensee<sup>3</sup>, to recover substantial damages from the contractor, provided such recovery was intended or contemplated by them both<sup>4</sup>. The principle also permits the recovery of substantial damages where the building contract imposes no bar on assignment by the employer, but where other circumstances threaten to create an unredressed liability if the employer is denied substantial damages<sup>5</sup>.

1    le the principle in *Dunlop v Lambert* (1839) 6 Cl & Fin 600: see PARA 1007 ante.

2    *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA (Panatown entered into a contract as principal for the development of a site owned by UIPL. Upon breach by the contractors McAlpine, Panatown successfully sued for substantial damages despite never having an interest in the relevant property).

3    *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA.

4    *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA; as explained in *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

5    *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA. The employer's ability to assign a valuable right of damages to the assignee claim was not debarred by the facts that (1) the employer's status as employer was effectively nominal, full powers of management over the contract having already been given to the assignee as the employer's agent; (2) the employer's involvement in the transaction was that of a mere financier, the contract containing elaborate provisions to ensure that the employer did not become involved in bringing proceedings against the contractor; and (3) in consequence of the contractual arrangements, the employer suffered no personal loss from the contractor's breach. None of these factors inhibited the conclusion that the employer had a personal right to substantial damages by virtue of the *Dunlop v Lambert* exception (see note 1 supra), and could therefore (by means of an otherwise valid assignment) confer on its assignees (who were the true site owners) a right to substantial damages by virtue of that exception. The crucial facts were: (a) that the assignees owned the property throughout; (b) that the contractors knew that the building was being erected for the assignees' benefit; and (c) that to deny the assignees a right to substantial damages would be to allow the manipulation of the rules of privity and damages to create a lacuna in the scheme of liability for wrongs. Cf *IMI Cornelius (UK) Ltd v Alan J Bloor* (1991) 57 BLR 108, 35 ConLR 1. The fact that the employer conveys his interest to the assignee before assigning his rights of action (thereby leaving no personal proprietary interest outstanding in himself at the actual date of assignment) does not of itself affect the assignee's right to recover substantial damages: *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SLT 533, HL. The employer cannot, however, confer on the assignee a more extensive right to damages than that enjoyed by the employer himself, and an assignee can recover no more than the assignor could have recovered had the benefit of the contract not been assigned: *Dawson v Greater Northern and City Rly Co* [1905] 1 KB 260 at 273, CA, per Stirling LJ; *Darlington Borough Council v Wiltshier Northern Ltd* supra; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1992] 57 BLR 57 at 80, CA, per Staughton LJ, and at 97-98 per Sir Michael Kerr (on appeal, without reference to this point, [1994] 1 AC 85, [1993] 3 All ER 417, HL). Cf *L/M International Construction Inc (now Bovis International Inc) v The Circle Ltd Partnership* (1995) 49 ConLR 12, [1995] NPC 128, CA. An employer who has no personal right to substantial damages (whether by virtue of the *Dunlop v Lambert* exception or by virtue of some other principle) cannot therefore, by making an otherwise effective assignment, enable another to recover substantial damages from the contractor. Where *Dunlop v Lambert* is inapplicable, and an employer who has no interest in the property has no right to substantial damages capable of transmission to the assignee, the contractor may escape liability.

**UPDATE**

**1012 No assignment; property constant**

NOTES 2-4--*Alfred McAlpine*, cited, reversed: [2000] 4 All ER 97, HL (employer could not recover substantial damages because true loss sufferer had direct remedy against contractor).

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### **1013. Disappointed legatees.**

The *Dunlop v Lambert* principle<sup>1</sup> does not enable a disappointed legatee to recover damages from the testator's negligent solicitor<sup>2</sup>, because it does not assist a claim by a stranger to a contract for a loss that the innocent party to that contract did not suffer<sup>3</sup>. Cases which attract the principle involve a single loss which might have been suffered indifferently by the obligee or by someone else and which the courts attribute to the obligee<sup>4</sup>.

1     I.e. the principle in *Dunlop v Lambert* (1839) 6 Cl & Fin 600: see PARA 1007 ante.

2     *White v Jones* [1995] 2 AC 207 at 267, [1995] 1 All ER 691 at 709-710, HL, per Lord Goff of Chieveley. Cf Coote 'Contract Damages: 'Ruxley' and the Performance Interest' [1997] CLJ 537 at 551-552.

3     *White v Jones* [1995] 2 AC 207 at 282, [1995] 1 All ER 691 at 724, HL, per Lord Mustill dissenting.

4     *White v Jones* [1995] 2 AC 207 at 282, [1995] 1 All ER 691 at 724, HL, per Lord Mustill.

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#### **1014. Consequential obligations.**

A claimant who recovers damages in accordance with the *Dunlop v Lambert* principle<sup>1</sup> must (after deducting the value of any personal loss or liability) pay the residue to the account of the owner or other person who suffers the true loss<sup>2</sup>. That person cannot compel the contracting party to sue under this principle<sup>3</sup> unless the contracting party is a trustee for him of the contract breaker's promise<sup>4</sup>.

<sup>1</sup> I.e. the principle in *Dunlop v Lambert* (1839) 6 Cl & Fin 600: see PARA 1007 ante.

<sup>2</sup> *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL; *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

<sup>3</sup> *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 847-848, [1976] 3 All ER 129 at 137-138, HL, per Lord Diplock; *White v Jones* [1995] 2 AC 207 at 267, [1995] 1 All ER 691 at 709-710, HL, per Lord Goff of Chieveley.

<sup>4</sup> Cf *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA (constructive trustee rationale adopted). See also *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA (point not pursued).

#### **UPDATE**

#### **1014 Consequential obligations**

NOTES 2, 4--*Alfred McAlpine*, cited, reversed on different grounds: [2000] 4 All ER 97, HL.

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## **(2) LIMITING OR CONSTRAINING FACTORS IN THE RECOVERY OF DAMAGES FOR BREACH OF CONTRACT**

### **(i) Remoteness**

#### **1015. General principle: the rule in *Hadley v Baxendale*.**

In the absence of some special statutory or contractual provision, the damages to which an innocent party is normally entitled in respect of a breach of contract are such as may fairly and reasonably be considered either as arising naturally (that is according to the usual course of things) from the breach, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it<sup>1</sup>.

<sup>1</sup> *Hadley v Baxendale* (1854) 9 Exch 341 at 354 per Alderson B. See generally Cooke 'Remoteness of Damages and Judicial Discretion' [1978] CLJ 288.

As with other principles which limit the damages recoverable on a breach of contract (eg mitigation: see PARA 1041 post), this general principle can alternatively be expressed in negative terms. Thus a party in breach is not to be made liable for damages beyond that measure of loss which may fairly be presumed to have been contemplated by the parties at the time of entering in the contract: see eg *British Columbia Saw-Mill Co Ltd v Nettleship* (1868) LR 3 CP 499 at 505-506 per Bovill CJ; cited in *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 398, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 699-700, HL, per Lord Morris of Borth-y-Gest.

### **UPDATE**

#### **1015 General principle: the rule in *Hadley v Baxendale***

NOTE 1--No arbitrary limit can be set once the test of remoteness has been satisfied; the only limit to liability applicable is when any loss sustained has become too speculative to permit the making of an award of damages: *Jackson v Royal Bank of Scotland plc* [2005] UKHL 3, [2005] 2 All ER 71, [2005] 1 WLR 377.

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### **1016. Status and origin of general principle.**

The judgment which formulated the general principle<sup>1</sup> has been described as a classic judgment which has continuously been recognised as enshrining and formulating the guiding rules to be followed in deciding whether damage resultant from a breach of contract should be borne by the party in breach<sup>2</sup>. It has been upheld and applied on numerous occasions by both the House of Lords<sup>3</sup> and the Court of Appeal<sup>4</sup>. Although the statement of general principle was designed as a direction to juries it has become an integral part of the law<sup>5</sup>. It crystallises a series of judicial formulations which arose to temper the harshness of the normal measure of damages to a contract breaker<sup>6</sup>, which might otherwise have made the contract breaker liable for a chain of unforeseen and fortuitous circumstances<sup>7</sup>. However, the law has not stood still since the general principle was formulated and later decisions have significantly refined it<sup>8</sup>.

<sup>1</sup> See the general principle in *Hadley v Baxendale* (1854) 9 Exch 341 at 354 per Alderson B: see PARA 1015 ante.

<sup>2</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 393, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 687, HL, per Lord Morris of Borth-y-Gest.

<sup>3</sup> See eg *R & H Hall v WH Pim (Junior) & Co Ltd* (1928) 33 Com Cas 324, HL; *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, HL; *Monarch Steamship Co v Karlshamns Oljefabriker* [1949] AC 196, [1949] 1 All ER 1, HL; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686, HL; *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* (1994) SLT 807, (1994) Times, 23 March, HL.

<sup>4</sup> See eg *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA; *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA; *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, [1978] 1 All ER 525, CA. In *W v Essex County Council* [1998] 3 All ER 111 at 129, CA, Stuart-Smith LJ said that, had a contract existed between the plaintiff foster parents with regard to the fostering of a child placed with them, and the County Council which arranged the fostering, and had such a contract been capable of sustaining an implied term that the child was not a sexual abuser (neither of which prerequisites was satisfied) the psychiatric shock which the foster parents suffered on learning that their own children had been abused by the foster child would not have been within the reasonable contemplation of the parties to the agreement.

<sup>5</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 414, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 710, HL, per Lord Pearce.

<sup>6</sup> *Robinson v Harman* (1848) 1 Exch 850.

<sup>7</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 414, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 710, HL, per Lord Pearce.

<sup>8</sup> *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* [1981] 1 Lloyd's Rep 175 at 181-182, [1980] Com LR 9 per Goff J; citing especially *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA; and *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686, HL. For a particular refinement relating to the use of the word 'probable' in the general principle see PARA 1017 post.

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**1017. More exacting level of predictability than in tort.**

The general principle<sup>1</sup> imposes on the claimant a higher degree of contemplation with regard to the likelihood of the particular loss than the corresponding general principle in tort<sup>2</sup>. This difference exists because the innocent party in a contract claim can impose a heavier liability for loss on the party in breach by communicating any special circumstances in advance of the contract. This in turn enables the party in breach to adopt protective measures, which may be either consensual or independent. Torts, being largely unanticipated, do not allow for such advance communication and provision<sup>3</sup>.

1 The principle in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 ante.

2 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 385-386, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 691-692, HL, per Lord Reid and at 422 and 715-716 per Lord Upjohn; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 185-186, 190-191, [1994] 3 All ER 506 at 525, 529-530, HL, per Lord Goff of Chieveley; *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* [1981] 1 Lloyd's Rep 175, [1980] Com LR 9. As to the position in tort see *Overseas Tankship (UK) v Morts Dock & Engineering Co Ltd, The Wagon Mound* [1961] AC 388, [1961] 1 All ER 404, PC; *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2)* [1967] 1 AC 617, [1966] 2 All ER 709, PC; and PARA 852 ante.

3 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 385-386, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 691-692, HL, per Lord Reid, and at 422 and 715-716 per Lord Upjohn. The remoteness test in contract is not one of directness: *Ogilvie Builders Ltd v Glasgow City District Council* (1994) 68 BLR 122; but cf para 1021 note 4 post.

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**1018. Consistency with compensatory role of damages.**

The general principle<sup>1</sup> conforms to the general policy of awarding damages which do no more than compensate the innocent party's loss<sup>2</sup>. It contemplates the recovery of true loss, and no more, by putting the innocent party, as far as money can achieve this, in the position which he would have occupied had the contract been performed<sup>3</sup>.

1     I.e. the principle in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 ante.

2     *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 at 482-483, HL, per Lord Warrington.

3     *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 102, [1997] 1 All ER 979 at 991, CA, per Auld LJ.



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**1019. Consistency with award of expectation interest.**

The general principle<sup>1</sup> is consistent with (albeit a restraint upon)<sup>2</sup> the normal policy of the law of damages in contract, of awarding that sum of money which will put the innocent party in the position which he would have been in had the contract been duly performed<sup>3</sup>. The general principle also applies, however, where the innocent party seeks to recover not his expectation loss but his reliance loss, that is that sum of money which will compensate him for the loss he has incurred in reliance on the other party's due performance of the contract<sup>4</sup>.

1     I.e. the principle in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 ante.

2     See *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 414, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 710, HL, per Lord Pearce; and PARA 1017 ante.

3     *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 102, [1997] 1 All ER 979 at 991, CA, per Auld LJ.

4     *Anglia Television v Reed* [1972] 1 QB 60 at 64, [1971] 3 All ER 690 at 692, CA, per Lord Denning MR. See further PARAS 995-996 ante. As to expectation loss see PARA 977 et seq ante; and as to reliance loss see PARA 987 et seq ante.

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### **1020. Policy of general principle.**

The general principle<sup>1</sup> may be justified on grounds of fairness or reasonableness and the avoidance of unduly harsh results<sup>2</sup>, and also by reference to considerations of economic efficiency and the avoidance of waste. By encouraging an innocent party to disclose facts which indicate exceptional potential losses, the general principle enables the other party to plan more rationally and effectively<sup>3</sup>: by unilaterally increasing his precautions against the occurrence of breach, or by increasing the price or his insurance cover, or by securing the incorporation of protective terms in the contract itself<sup>4</sup>.

1 The principle in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 ante.

2 *Cory v Thames Ironworks Co* (1867-68) LR 3 QB 181 at 190-191, per Blackburn J; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 397, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 699, HL, per Lord Morris of Borth-y-Gest.

3 *Cory v Thames Ironworks Co* (1867-8), LR 3 QB 181 at 190-191 per Blackburn J.

4 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 421-422, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 715-716, HL, per Lord Upjohn.

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### 1021. Two aspects to the general principle.

The general principle<sup>1</sup> is conventionally seen as disclosing two branches<sup>2</sup>, divided according to the type of knowledge possessed by the contract breaker. It differentiates between those losses which result from normal or usual or everyday circumstances, and those which result from special or unusual or extraordinary circumstances, not predictable in the ordinary run of events. Losses which may fairly and reasonably be viewed as arising naturally (that is, according to the usual course of things) from the breach are seen as resulting from normal circumstances, which the innocent party need not communicate to the other, for everyone is deemed, as a reasonable person, to know the ordinary course of things and the loss liable to result therefrom<sup>3</sup>. Losses which may reasonably be supposed to have been in the contemplation of both parties at the time of contracting as the probable result of a breach of the contract are seen as resulting from special circumstances, which the party in breach cannot be presumed to have known in the absence of specific communication or proof of other knowledge<sup>4</sup>.

1 The principle in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 ante.

2 See eg *Cullinane v British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292 at 301, [1953] 2 All ER 1257 at 1260-1261, CA, per Sir Raymond Evershed MR.

3 *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 539, [1949] 1 All ER 997 at 1002-1003, CA, per Asquith LJ; cited in *Brown v KMR Services Ltd* [1995] 4 All ER 598 at 642, [1995] 2 Lloyd's Rep 513 at 556, CA, per Hobhouse LJ.

4 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 416, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 712, HL, per Lord Pearce. The difference between ordinary and special contemplation (as delineated by the first and second aspects of the rule in *Hadley v Baxendale* (1854) 9 Exch 341) broadly marks a further division, relevant to the construction of exclusion clauses and similar protective terms. Clauses which purport to exclude liability for 'consequential loss' have been construed as debarring recovery only for those losses which do not directly and naturally result, in the ordinary course of events, from the breach in question: *Croudace Construction Ltd v Cawoods Concrete Products Ltd* [1978] 2 Lloyd's Rep 55, [1978] 8 Build LR 20, CA, upholding Parker J at first instance and following *Millars Machinery Co Ltd v David Way & Son* (1935) 40 Com Cas 204 at 210, CA, per Roche LJ (late delivery by supplier of building materials; losses in form of cost of keeping men and materials on site without work were direct and natural result of breach; liability not therefore excluded on ground that those losses 'consequential'). See also *B Sunley & Co v Cunard White Star Ltd* [1940] 1 KB 740, CA; *British Sugar plc v NEI Power Projects Ltd* (1997) 87 BLR 42, CA, per Waller LJ, applying *Croudace Construction Ltd v Cawoods Concrete Products Ltd* supra and *Millars Machinery Co Ltd v David Way & Son* supra (on true construction of contract for installation of electrical equipment, 'consequential loss' meant loss proved in excess of that which was a direct result of the breach; parties had therefore agreed to limit liability of installer only for loss and damage not directly and naturally resulting from the breach, to an amount equal to the value of the contract). In similar vein, the construction of the words 'direct loss and/or expense' within a contract has been approached in terms of the division between the first and second aspects of the rule in *Hadley v Baxendale* supra: see *FG Minter Ltd v Welsh Health Technical Services Organisation* (1980) 13 BLR 1, CA; following *Saint Line Ltd v Richardsons Westgarth & Co* [1940] 2 KB 99. See also *Wright Ltd v PH & T (Holdings) Ltd* (1980) 13 BLR 26 (distinction between 'direct' and 'indirect' or 'consequential' losses is the same as that between the two aspects of *Hadley v Baxendale* supra; loss or damage is 'direct' for this purpose if it can fairly be said to be something which arises naturally and in the ordinary course of things).

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### 1022. Single integrated rule.

Although the general principle<sup>1</sup> was formerly treated as comprising two rules, the broad effect of post-war authority<sup>2</sup> has been to analyse the principle as disclosing a single rule<sup>3</sup>, an approach which corresponds with practice<sup>4</sup>. The two aspects of the general principle do not, therefore, connote two different rules or standards or tests<sup>5</sup>. It is not necessary to treat them antithetically and indeed they might run into one another<sup>6</sup>. Modern authorities do substantially conflate them, while recognising that the factual application of the general principle may vary according to the degree of relevant knowledge possessed by the party in breach at the time of contracting<sup>7</sup>, and that opinions may differ as to whether a particular fact qualifies as basic knowledge or special knowledge for the purposes of either the first or the second aspects of the general principle<sup>8</sup>.

1 The principle in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 ante.

2 *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686, HL.

3 *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* [1981] 1 Lloyd's Rep 175 at 182, [1980] Com LR 9 per Goff J; *Biggin & Co v Permanite* [1951] 1 KB 422 at 436, [1950] 2 All ER 859 at 869 per Devlin J (revsd [1951] 2 KB 314, CA).

4 *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* [1981] 1 Lloyd's Rep 175 at 182, [1980] Com LR 9 per Goff J.

5 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 385, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 691, HL, per Lord Reid.

6 *R & H Hall v WH Pim (Junior) & Co Ltd* (1928) 33 Com Cas 324 at 334, HL, per Lord Shaw; cited in *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 414, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 710, HL, per Lord Pearce, and at 422 and 715-716 per Lord Upjohn who deems it immaterial whether one treats the general principle as disclosing two rules or two branches of one rule.

7 *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* [1981] 1 Lloyd's Rep 175 at 182-183, [1980] Com LR 9 per Goff J.

8 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 416, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 711-712, HL, per Lord Pearce.

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### **1023. Statement of integrated rule.**

The integrated rule<sup>1</sup> limits the innocent party's damages to those losses which may be regarded as being within the contemplation of the parties<sup>2</sup> in the sense that they were not unlikely to occur or in the sense that there was a serious possibility of their occurrence<sup>3</sup>. The broad rule is that the innocent party recovers that loss which was in the assumed contemplation of both parties in the light of those general or special facts (as the case may be) which were known to both parties in regard to damages as the result of a breach of contract<sup>4</sup>. The crucial question for the court is whether, on the information available to the defendant when the contract was made<sup>5</sup>, either the defendant should, or a reasonable man in the defendant's position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within the defendant's contemplation<sup>6</sup>.

1 See PARA 1022 ante.

2 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 414-415, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 710-711, HL, per Lord Pearce.

3 *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* [1981] 1 Lloyd's Rep 175 at 182, [1980] Com LR 9 per Goff J.

4 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 421, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 715, HL, per Lord Upjohn; *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 93-94, 99, [1997] 1 All ER 979 at 983-984, 989, CA, per Otton LJ.

5 See *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA; *Hydraulic Engineering Co Ltd v McHaffie Goslett & Co* (1878) 4 QBD 670, CA; *Kollman v Watts* [1963] VLR 396.

6 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 385, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 691, HL, per Lord Reid; *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 93-94, 99, [1997] 1 All ER 979 at 983-984, 989, CA, per Otton LJ.

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### 1024. Function of first aspect of the general principle.

The first aspect of the general principle<sup>1</sup> affixes liability on the contract breaker for those matters which may fairly and reasonably be considered as arising naturally (that is, within the ordinary course of things<sup>2</sup>) from the breach<sup>3</sup>. Such matters are the basic or normal circumstances prevailing within the type of trade or transaction in question<sup>4</sup>. In cases at least where the parties practise the same trade or operate within the same specific sphere of business, such matters may be presumed to be within the contemplation of the parties<sup>5</sup>. The first aspect proceeds on the assumption that reasonable business persons must be taken, without special discussion or communication, to understand the ordinary practices and exigencies of the other's trade or business<sup>6</sup>, and to be sufficiently acquainted with the general business position<sup>7</sup>. However, even this aspect of the general principle requirement of contemplation depends on knowledge of certain basic facts, such as the subject matter of the transaction and, perhaps, its source or function. On this limited basis of knowledge, the horizon of contemplation is confined to things arising naturally (that is, within the ordinary course of things)<sup>8</sup>. Moreover, there is no general rule that contracting parties are presumed in all circumstances to have reasonable knowledge of the course of business conducted by each other<sup>9</sup>. That must ultimately be a question of circumstances<sup>10</sup>, the resolution of which will depend in part on the degree of community or coincidence between the business activities of each party<sup>11</sup> and the simplicity or otherwise of those activities as conducted by the innocent party<sup>12</sup>. At the end of the day reasonable contemplation is a question of fact<sup>13</sup>.

1    le the principle in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 ante.

2    *Hadley v Baxendale* (1854) 9 Exch 341 at 354-355 per Alderson B; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 416, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 711, HL, per Lord Pearce; *Monarch Steamship Co v Karlshamns Oljefabriker* [1949] AC 196 at 224-225, [1949] 1 All ER 1 at 14, HL, per Lord Wright. Cf *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* (1994) SLT 807 at 810, (1994) Times, 23 March, HL, per Lord Jauncey of Tullichettle.

3    *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* 1994 (SLT) 807, (1994) Times, 23 March, HL.

4    *Monarch Steamship Co v Karlshamns Oljefabriker AB* [1949] AC 196 at 224-225, [1949] 1 All ER 1 at 14, HL, per Lord Wright.

5    *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 416, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 711, HL, per Lord Pearce; *Monarch Steamship Co v Karlshamns Oljefabriker* [1949] AC 196 at 224-225, [1949] 1 All ER 1 at 14, HL, per Lord Wright.

6    *Monarch Steamship Co v Karlshamns Oljefabriker AB* [1949] AC 196 at 224-225, [1949] 1 All ER 1 at 14, HL, per Lord Wright; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 416, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 711, HL, per Lord Pearce. Cf *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* (1994) SLT 807 at 810, (1994) Times, 23 March, HL, per Lord Jauncey of Tullichettle.

7    *Monarch Steamship Co v Karlshamns Oljefabriker AB* [1949] AC 196 at 225, [1949] 1 All ER 1 at 14, HL, per Lord Wright; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 416, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 711, HL, per Lord Pearce. See also *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, HL.

8    *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 416, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 711, HL, per Lord Pearce.

9 *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* (1994) SLT 807 at 810, (1994) Times, 23 March, HL, per Lord Jauncey of Tullichettle; explaining *Monarch Steamship Co v Karlshamns Oljefabriker AB* [1949] AC 196 at 224-225, [1949] 1 All ER 1 at 14, HL, per Lord Wright.

10 *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* (1994) SLT 807 at 811, (1994) Times, 23 March, HL, per Lord Jauncey of Tullichettle.

11 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 424, sub nom *Koufos v C Czarnikow, The Heron II* [1967] 3 All ER 686 at 717, HL, per Lord Upjohn; cited in *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* 1994 (SLT) 807 at 810, (1994) Times, 23 March, HL, per Lord Jauncey of Tullichettle.

12 'No doubt the simpler the activity of the one, the more readily can it be inferred that the other would have reasonable knowledge thereof. However, when the activity of A involves complicated construction or manufacturing techniques, I see no reason why B who supplies a commodity that A intends to use in the course of those techniques should be assumed, merely because of the order for the commodity, to be aware of the details of all the techniques undertaken by A and the effect thereupon of any failure of or deficiency in that commodity': *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* 1994 (SLT) 807 at 810, (1994) Times, 23 March, HL, per Lord Jauncey of Tullichettle.

13 *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* (1994) SLT 807 at 811, (1994) Times, 23 March, HL, per Lord Jauncey of Tullichettle.

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### **1025. Function of second aspect of the general principle.**

The second aspect of the general principle<sup>1</sup> governs cases when the effects of a breach exceed or fall short of those which would occur in the 'normal' or 'basic' circumstances covered by the first aspect<sup>2</sup>. In this event, the contract breaker must have special knowledge of the relevant circumstances. This is normally communicated by the innocent party, but special knowledge derived from other sources (such as independent information about the innocent party's business or about the existence of a particular market) may suffice<sup>3</sup>. If special circumstances are thus communicated, or are otherwise known to both parties<sup>4</sup>, the damages which the parties would normally contemplate as those resulting from the breach of such contract would be the amount of loss which would ordinarily follow from a breach of contract under the special circumstances so communicated or known<sup>5</sup>.

1 The principle in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 ante.

2 As to the first aspect of the general principle see PARA 1024 ante.

3 *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* [1981] 1 Lloyd's Rep 175 at 183, [1980] Com LR 9 per Goff J; but cf *British Columbia Saw-Mill Co Ltd v Nettleship* (1868) LR 3 CP 499. See PARA 1031 post.

4 It is uncertain whether knowledge by the plaintiff is essential; but cf *British Columbia Saw-Mill Co Ltd v Nettleship* (1868) LR 3 CP 499; see also PARA 1031 post.

5 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 385, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 691, HL, per Lord Reid and at 419 and 713-714 per Lord Pearce.

The communication of special circumstances to a party who later breaks the contract may operate either to enlarge or to narrow the recoverable field of damages, according to circumstance. Such communication may disclose facts which indicate that the innocent party would in fact suffer less damage than a more limited view of the circumstances might have led the party in breach to suspect: *Koufos v C Czarnikow Ltd* supra at 416-417, sub nom *Koufos v C Czarnikow Ltd, The Heron II* at 712 per Lord Pearce; *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 99-100, [1997] 1 All ER 979 at 989, CA, per Otton LJ; and see *Biggin & Co v Permanite* [1951] 1 KB 422 at 436, [1950] 2 All ER 859 at 869 per Devlin J (revsd [1951] 2 KB 314, CA).



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### **1026. Amplification of general principle; recoverable loss.**

Numerous formulations seek to define the limits of recoverable loss. However, no particular phrase should command undue emphasis and there is no need to state a preference among the numerous acceptable phrases<sup>1</sup>. That said, it seems clear that, in the absence of specific communication, a particular type of loss will fairly and reasonably be regarded as having been in the contemplation of the parties for the purpose of the general principle<sup>2</sup> if there is a serious possibility or real danger<sup>3</sup> or grave risk<sup>4</sup> or grave danger<sup>5</sup> of its occurrence, or if the result is one which will occur in the great majority or multitude of cases<sup>6</sup>, or if it is likely because it would happen in the great majority of cases<sup>7</sup>, or if it is quite likely<sup>8</sup>, or at least not unlikely<sup>9</sup>, to result, or if it is reasonably foreseeable as likely to result<sup>10</sup>, or if it would have appeared to the contract breaker as not unlikely to occur<sup>11</sup>, or if it would in all probability have occurred<sup>12</sup>. A loss may, it seems, be recoverable where the probability of its occurrence is less than an even chance, but is nevertheless not very unusual and easily foreseeable<sup>13</sup>. It may be questioned whether, at this level of prospect, the word probability is appropriate<sup>14</sup>.

<sup>1</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 397, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 699, HL, per Lord Morris of Borth-y-Gest.

<sup>2</sup> Ie the principle in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 ante.

<sup>3</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 390, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 694-695, HL, per Lord Reid, at 400 and 701 per Lord Morris of Borth-y-Gest, and at 415 and 711 per Lord Pearce; *Monarch Steamship Co v Karlshamns Oljefabriker AB* [1949] AC 196 at 233, [1949] 1 All ER 1 at 19, HL, per Lord du Parc; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 540, [1949] 1 All ER 997, CA, per Asquith LJ.

<sup>4</sup> *Monarch Steamship Co v Karlshamns Oljefabriker AB* [1949] AC 196 at 235, [1949] 1 All ER 1 at 20, HL, per Lord Morton.

<sup>5</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 427, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 719, HL, per Lord Upjohn.

<sup>6</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 390, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 695, HL, per Lord Reid, and see at 410-411 and 708 per Lord Hodson.

<sup>7</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 384-385, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 691, HL, per Lord Reid.

<sup>8</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 390, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 694-695, HL, per Lord Reid.

<sup>9</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 388, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 693, HL, per Lord Reid; *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* (1994) SLT 807 at 809, (1994) Times, 23 March, HL, per Lord Jauncey of Tullichettle.

<sup>10</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 397, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 699, HL, per Lord Morris of Borth-y-Gest.

<sup>11</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 388, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 693, HL, per Lord Reid; *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* 1994 (SLT) 807 at 809, (1994) Times, 23 March, HL, per Lord Jauncey of Tullichettle. See also *R & H Hall Ltd v WH Pim (Junior) & Co Ltd* 33 Com Cas 324 at 333, 335-336, per Lord Shaw; *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 97, [1997] 1 All ER 979 at 987, CA, per Otton LJ.

12     *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 385, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 693, HL, per Lord Reid. But cf as to probability (see PARA 1029 post).

13     *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 388, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 693, HL, per Lord Reid, semble per others. But cf as to probability (see PARA 1029 post). Cf *R & H Hall v WH Pim (Junior) & Co Ltd* (1928) 33 Com Cas 324 at 329-330, HL, per Viscount Dunedin (a loss may be probable notwithstanding that the chances are not all in favour of its occurrence, if there is an even chance of its happening).

14     Cf para 1029 post.

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### **1027. Matters not required.**

It is unnecessary for the purposes of recovering loss that there should have been (on the facts known or assumed to be known to the contract breaker) an odds-on probability<sup>1</sup>, or a certainty or near certainty<sup>2</sup> or reasonable certainty<sup>3</sup>, that the loss would occur, or that the relevant breach must necessarily result in the loss which occurred<sup>4</sup>, or that the chances are all in favour of its happening<sup>5</sup>, or that it was more likely to happen than not<sup>6</sup>. Indeed, it seems that there need not be an even chance that the loss would occur<sup>7</sup>.

<sup>1</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 425, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 717-718, HL, per Lord Upjohn, and at 416 and 711-712 per Lord Pearce.

<sup>2</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 425, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 717-718, HL, per Lord Upjohn.

<sup>3</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 411, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 708, HL, per Lord Hodson.

<sup>4</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 396, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 698, HL, per Lord Morris of Borth-y-Gest.

<sup>5</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 424-425, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 717, HL, per Lord Upjohn.

<sup>6</sup> *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 410, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 707, HL, per Lord Hodson.

<sup>7</sup> See *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 410, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 707, HL, per Lord Hodson; and PARA 1026 ante.

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**1028. Amplification of general principle; non-recoverable loss.**

A loss will not fairly and reasonably be regarded as having been in the contemplation of the parties for the purpose of the general principle<sup>1</sup> if, though foreseeable as a substantial possibility, it is one which would happen only in a small minority of cases<sup>2</sup>. It is not sufficient to satisfy the general principle that it was reasonably foreseeable that the result complained of might occur<sup>3</sup>, or (perhaps) that the type of damage suffered was plainly foreseeable as a real possibility but would occur only in a small minority of cases<sup>4</sup>, or was reasonably foreseeable as liable to result<sup>5</sup>, or that the loss was 'on the cards'<sup>6</sup>, or that the loss followed directly from the breach<sup>7</sup>.

1 The principle in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 ante.

2 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 384, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 690, HL, per Lord Reid.

3 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 406, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 705, HL, per Lord Morris of Borth-y-Gest.

4 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 384-385, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 691, HL, per Lord Reid.

5 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 385, 389, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 691, 693, HL, per Lord Reid.

6 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 390, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 694, HL, per Lord Reid, at 399 and 700 per Lord Morris of Borth-y-Gest, at 415 and 711, per Lord Pearce and at 425 and 717-718, per Lord Upjohn.

7 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 385, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 691, HL, per Lord Reid.

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### 1029. Doubtful expressions: 'probable' and 'liable to occur'.

Although the word 'probable' appears in the statement of the general principle<sup>1</sup>, and has been held to apply to both its first and second aspect<sup>2</sup>, the expression of the required level of predictability in terms of probability (while attracting some support)<sup>3</sup> is generally disfavoured<sup>4</sup>, unless the word 'probable' is construed in the attenuated sense of 'not unlikely'<sup>5</sup>, in which event it arguably ceases to have independent meaning<sup>6</sup>. The expression 'liable to result' has some support as the appropriate object of contemplation<sup>7</sup> but is elsewhere described as ambiguous and as neither adding to nor subtracting from the expressions 'serious possibility' and 'real danger'<sup>8</sup>.

1 The principle in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 ante.

2 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 410, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 707, HL, per Lord Hodson. See PARAS 1024-1025 ante.

3 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 383, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 690, HL, per Lord Reid (was the loss one which would in all probability have occurred); *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791 at 801, [1978] 1 All ER 525 at 531, CA, per Lord Denning MR (would a reasonable man in the position of the party in breach contemplate the relevant consequences as being of a very substantial degree of probability; but cf at 802-804 and at 532-534 per Lord Denning MR).

4 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 397-399, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 699-670, HL, per Lord Morris of Borth-y-Gest, and at 424 and 717 per Lord Upjohn. 'In *Koufos v C Czarnikow Ltd* (supra) their Lordships were in general unwilling to accept foreseeability as the criterion of remoteness in contract, considering it to be more appropriate to liability in tort. Lord Reid, for example, preferred as a criterion for contractual liability the test whether the damages claimed were within the contemplation of the defendant at the time of the contract in the sense of being 'not unlikely' to result from the breach. Others of their Lordships used different phraseology; but the thread running through the speeches is that the damages must have been within the contemplation of the defendant, not in the sense that they were probable (which would be too strict a test) but rather in the sense that there was a serious possibility of their occurrence or that they were not unlikely to occur. The general result of the two cases is that the principle in *Hadley v Baxendale* (see note 1 supra) is now no longer stated in terms of two rules, but rather in terms of a single principle - though it is recognised that the application of the principle may depend on the degree of relevant knowledge held by the defendant at the time of the contract in the particular case': *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* [1981] 1 Lloyd's Rep 175 at 182, [1980] Com LR 9 per Goff J.

5 *R & H Hall v WH Pim (Junior) & Co Ltd* (1928) 33 Com Cas 324 at 337, HL, per Lord Shaw; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 414, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 710, HL, per Lord Pearce.

6 Cf *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* 1994 (SLT) 807 at 809, (1994) Times, 23 March, HL, per Lord Jauncey of Tullichettle, citing with approval Lord Reid in *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 388, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 693, HL, after consideration of *R & H Hall Ltd v WH Pim (Junior) & Co Ltd* (1928) 33 Com Cas 324 at 337, HL, per Lord Shaw: 'I would agree with Lord Shaw that it is generally sufficient that that event would have appeared to the defendant as not unlikely to occur. It is hardly ever possible in this matter to assess probabilities with any degree of mathematical accuracy. But I do not find in that case or in cases which preceded it any warrant for regarding as within the contemplation of the parties any event which would not have appeared to the defendant, had he thought about it, to have a very substantial degree of probability'.

7 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 410-411, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 707, HL, per Lord Hodson (impossible to improve on 'liable' and prefers it to 'likely' if latter means that chances are all in favour of the occurrence in question); and see Lord Morris of Borth-y-Gest

at 397-399 and 699-701; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 540, [1949] 1 All ER 997, CA, per Asquith LJ; *Brown v KMR Services Ltd* [1995] 4 All ER 598 at 621, [1995] 2 Lloyd's Rep 513 at 542, CA, per Stuart-Smith LJ.

8     *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 414, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 710, HL, per Lord Pearce.

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### 1030. Contemplation.

The word contemplation affords a more accurate description of the required state of mind than the words foresight or reasonable foresight<sup>1</sup>, although older authorities occasionally use the latter in the sense of the former<sup>2</sup>. In any event the crucial question is contemplation (or foresight) as to what. The innocent party need not show that the parties contemplated the breach<sup>3</sup>, or that the contract breaker actually considered the loss likely to result from the relevant breach<sup>4</sup>. All that is necessary is that a reasonable man in the position of the contract breaker would have concluded, had he considered the matter, that the type of loss in question was likely to result<sup>5</sup>. In this respect, the court must embark on a hypothesis; it must assume (even if contrary to the fact) that the parties had in mind the breach that occurred<sup>6</sup>. Damages identified as being within the contemplation of the parties, and thus recoverable, are so identified not because the parties contemplate a breach of contract, but because the parties recognise that a breach is possible and reckon that these damages will or may flow from that breach<sup>7</sup>.

1 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 423, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 716, HL, per Lord Upjohn.

2 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 423, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 716, HL, per Lord Upjohn, explaining *Cory v Thames Ironworks Co* (1868) 37 LJQB 68, LR 3 QB 181 per Blackburn J.

3 *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791 at 807, [1978] 1 All ER 525 at 537, CA, per Scarman LJ.

4 *Brown v KMR Services Ltd* [1995] 4 All ER 598 at 621, [1995] 2 Lloyd's Rep 513 at 542, CA, per Stuart-Smith LJ, and see at 642-643 per Hobhouse LJ.

5 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 399, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 700-701, HL, per Lord Morris of Borth-y-Gest (but with 'likely' substituted for 'liable').

6 *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791 at 807, [1978] 1 All ER 525 at 537, CA, per Scarman LJ.

7 *R & H Hall v WH Pim (Junior) & Co Ltd* (1928) 33 Com Cas 324 at 337, HL, per Lord Phillimore, cited in *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 414, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 710, HL, per Lord Pearce.

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### **1031. Assumption of obligation.**

Liability for a particular type of loss need not<sup>1</sup> generally be a term of the contract in order for damages in respect of that type of loss to be recoverable<sup>2</sup>. The contract breaker's liability for a particular type of loss does not depend on his having expressly or impliedly assented to, or having voluntarily assumed, an obligation to answer for that particular type of loss<sup>3</sup>. Any former principle to that effect is now substantially relaxed<sup>4</sup>. To that extent, the word 'contemplated' in the statement of general principle<sup>5</sup> states merely the required level of prediction and does not import some voluntary assumption of responsibility. However, in cases (at least) where liability for a particular type of loss requires special knowledge<sup>6</sup>, such liability may not depend solely on the contract breaker's possession of knowledge sufficient to enable him to contemplate the occurrence of the particular type of loss, but may further depend on some actual or reasonably inferable appreciation or acceptance, on the part of the contract breaker, of the other party's expectation that the contract breaker will answer for the loss<sup>7</sup>. The question is whether the circumstances in which the relevant facts came to the contract breaker's knowledge are such that a reasonable person in the contract breaker's position would, if he had considered the matter at the time the contract was made, have contemplated that, in the event of a breach by him, such facts were to be taken into account when considering his responsibility for loss suffered by the innocent party as a result of the breach<sup>8</sup>. In many cases, if not in the majority, this requirement will be readily and affirmatively answered from the mere fact of the contract breaker's knowledge, while in others knowledge imparted casually<sup>9</sup> may fail in any event to bring the occurrence of a particular type of loss within the contract breaker's contemplation<sup>10</sup>. Moreover, claims to certain categories of loss may fail on grounds that there was no original assumption of duty, and therefore no breach<sup>11</sup>. The rule stated is consistent both with those general statements which describe the special knowledge in question as knowledge of both parties (not merely of the defendant)<sup>12</sup> and as knowledge communicated to the party in breach by the innocent party<sup>13</sup>, and with the occasional recognition that these normal conditions may themselves be relaxed<sup>14</sup>. It also accords with the occasional expressions of the rule of remoteness as covering those matters which the party in breach ought commercially to take into account<sup>15</sup>.

1 Cf *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA. As to the principle of agreed substantial loss see PARA 1070 post.

2 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 422, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 715, HL, per Lord Upjohn.

3 'I do not see why that should be so. If parties enter into the contract with knowledge of some special circumstances, and it is reasonable to infer a particular loss as a result of those circumstances that is something which both must contemplate as a result of a breach': *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 422, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 715, HL, per Lord Upjohn; *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep 555, 120 Sol Jo 401, CA; but cf *British Columbia Saw-Mill Co Ltd v Nettleship* (1868) LR 3 CP 499.

4 *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* [1981] 1 Lloyd's Rep 175 at 182, [1980] Com LR 9 per Goff J; cf at 183 per Lord Goff (second aspect of the general principle formerly understood to require not only communication of special circumstances but communication in such a way that the party in breach, by entering into the contract, assented expressly or impliedly to assume the risk of loss flowing from such circumstances). As to the second aspect of the general principle see PARA 1025 ante.

5 Ie the principle in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 ante.



6 Where liability proceeds on basic knowledge within the first aspect of the general principle (as to which see PARA 1024 ante), any further requirement as to appreciation or acceptance of risk is almost always, if not always, incontrovertibly met.

7 *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* [1981] 1 Lloyd's Rep 175, [1980] Com LR 9. See also *Seven Seas Properties Ltd v Al-Essa (No 2)* [1993] 3 All ER 577 at 582, [1993] 1 WLR 1083 at 1088 per Gavin Lightman QC.

8 'The answer to that question may vary from case to case, taking into consideration such matters as, for example, the nature of the facts in question and how far they are unusual, and the extent to which such facts are likely to make fulfilment of the contract by the due date more critical, or to render the plaintiff's loss heavier in the event of non-fulfilment': *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA* [1981] 1 Lloyd's Rep 175 at 183, [1980] Com LR 9 per Goff J. See also *Brown v KMR Services Ltd* [1995] 4 All ER 598 at 621, [1995] 2 Lloyd's Rep 513 at 542, CA, per Stuart-Smith LJ, who refers to 'loss ... flowing from a particular contract which gives rise to very high profits the existence of which is not known to the other contracting party who therefore does not accept the risk of such loss occurring'. See further *Seven Seas Properties Ltd v Al-Essa (No 2)* [1993] 3 All ER 577 at 582-583, [1993] 1 WLR 1083 at 1088 per Gavin Lightman QC; *Smith New Court Securities v Scrimgeour Vickers* [1997] AC 254, [1996] 4 All ER 769, HL; *Hayes v James & Charles Dodd (a firm)* [1990] 2 All ER 815, [1988] BTLC 380, CA; *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at 143, [1966] 1 WLR 1428 at 1448, CA, per Diplock LJ. Cf *Chitty on Contracts* (27th Edn, 1994) PARA 26-023.

9 *Kemp v Intasun Holidays Ltd* [1987] BTLC 353, 6 Tr L Rep 161, CA. See also *British Columbia Saw-Mill Co Ltd v Nettleship* (1868) LR 3 CP 499 at 509 per Willes J; affd *Horne v Midland Rly Co* (1873) LR 8 CP 131 at 146 per Lush B, and at 139 per Martin B.

10 *Kemp v Intasun Holidays Ltd* [1987] BTLC 353, 6 Tr L Rep 161, CA, where the court did not find it necessary to consider arguments based on *British Columbia Saw-Mill Co Ltd v Nettleship* (1868) LR 3 CP 499 (see note 9 supra).

11 *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, [1996] 3 All ER 365, HL; *Smith New Court Securities v Scrimgeour Vickers* [1997] AC 254, [1996] 4 All ER 769, HL.

12 *British Columbia Saw-Mill Co Ltd v Nettleship* (1868) LR 3 CP 499 at 509 per Willes J.

13 *Hadley v Baxendale* (1854) 9 Exch 341 at 354 per Alderson B.

14 See *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at 143, [1966] 1 WLR 1428 at 1448, CA, per Diplock LJ.

15 *Monarch Steamship Co v Karlshamns Oljefabriker AB* [1949] AC 196, at 232, [1949] 1 All ER 1 at 18, HL, per Lord Uthwatt, cited by Lord Pearce in *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 415, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686 at 711, HL.

## UPDATE

### 1031 Assumption of obligation

NOTE 1--*Alfred McAlpine*, cited, reversed: [2000] 4 All ER 97, HL.

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### 1032. Types of loss.

References in the authorities to the requisite contemplation of loss refer to broad types or general categories of loss rather than to precise particulars or forms of loss. It suffices if the contract breaker contemplated (or should reasonably have contemplated) the general type or kind of loss suffered as a not unlikely result of the breach<sup>1</sup>. The general principle<sup>2</sup>, as construed, does not require the contract breaker to contemplate (or to have been in a position to contemplate) the exact nature, extent, scale or origin of the loss suffered<sup>3</sup>. The mere fact, therefore, that one party's loss vastly exceeds that which could have been contemplated by the other party in the ordinary course of events does not by itself exclude the loss suffered from the recoverable class of damage; such loss may remain within the broad type of loss which could have been contemplated by the contract breaker<sup>4</sup>. This principle, which is consonant with justice<sup>5</sup>, allows the courts considerable discretion to adjust the level of recovery through definition of the relevant type of loss<sup>6</sup>. Moreover, the more widely or generally the court defines the obligation of which the defendant is in breach, the more extensive and varied the categories of loss able to be contemplated are likely to be<sup>7</sup>.

1 *Brown v KMR Services Ltd* [1995] 4 All ER 598 at 621, [1995] 2 Lloyd's Rep 513 at 542, CA, per Stuart-Smith LJ, citing *Chitty on Contracts* (27th Edn, 1994) PARA 26-023. This aspect of the law governing damages in contract is echoed by the law of tort: see *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd, The Wagon Mound* [1961] AC 388 at 426, [1961] 1 All ER 404 at 415, PC. As to damages in tort see PARA 851 et seq ante.

2 The principle in *Hadley v Baxendale* (1854) 9 Exch 341: see PARA 1015 ante.

3 See the phrases used by individual judges in *Koufos v C Zarnikow Ltd* [1969] 1 AC 350, sub nom *Koufos v C Zarnikow Ltd, The Heron II* [1967] 3 All ER 686, HL, as listed by *Chitty on Contracts* (27th Edn, 1994) PARA 26-023. See also *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791 at 806, [1978] 1 All ER 525 at 536-537, CA, per Scarman LJ (merely the type of consequence, not the specific consequence, need be contemplated); *Brown v KMR Services Ltd* [1995] 4 All ER 598 at 621, [1995] 2 Lloyd's Rep 513 at 542, CA, per Stuart-Smith LJ.

4 *Brown v KMR Services Ltd* [1995] 4 All ER 598 at 621, [1995] 2 Lloyd's Rep 513 at 542, CA, per Stuart-Smith LJ, and at 642-643 and 556 per Hobhouse LJ (losses under Lloyd's 'disaster' syndicates) following *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, [1978] 1 All ER 525, CA, and semble preferring *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* supra to *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA, in so far as they conflict, but adding (apparently by way of reconciliation) that loss of ordinary business profits differs in kind from loss flowing from a particular contract which gives rise to a very high profit but is unknown to the other party. But cf *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1 QB 88; revsd [1971] 1 QB 111n, CA (loss of profit). See also *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375 at 405, [1995] 2 All ER 769, CA, per Bingham LJ (overruled without reference to this point [1997] AC 191, HL); *British and Commonwealth Holdings plc v Quadrex Holdings Inc* (10 April 1995, unreported), CA, both cited in *Brown v KMR Services Ltd* [1995] 4 All ER 598 at 643, [1995] 2 Lloyd's Rep 513 at 557, CA, per Hobhouse LJ.

5 *Brown v KMR Services Ltd* [1995] 4 All ER 598 at 643, [1995] 2 Lloyd's Rep 513 at 557, CA, per Hobhouse LJ.

6 See *Chitty on Contracts* (27th Edn, 1994) PARA 26-024.

7 See eg the variant definitions of the term broken in *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, [1978] 1 All ER 525, CA.

### UPDATE

### **1032 Types of loss**

NOTE 4--See *Hotel Services Ltd v Hilton International Hotels (UK) Ltd* [2000] 1 All ER (Comm) 750, CA.

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### **1033. Recovery up to level of contemplation.**

An innocent party who suffers damage of a special kind, and has not brought the prospect of such damage to the attention of the party in breach, may recover in respect of the damage suffered, but his damages must not exceed such damages as would be produced in the ordinary course of events by the act complained of<sup>1</sup>. It may follow from this principle that, where the breach consists of a failure to make available to the innocent party a chattel which he requires for some special purpose not specifically communicated to the party in breach, the party in breach is liable for those losses which might reasonably have been expected, in the ordinary course of things, to flow from the breach as the natural consequence thereof<sup>2</sup>. That liability may follow, though it involves reparation for a loss which would have resulted from some everyday or normal purpose, to which the innocent party did not intend to apply the chattel, and which was not therefore within the parties' contemplation when the contract was made<sup>3</sup>.

1 *Cory v Thames Ironworks Co* (1868) LR 3 QB 181; *Building and Civil Engineering Holidays Scheme v Post Office* [1966] 1 QB 247 at 261-262, [1965] 1 All ER 163 at 167-168, CA, per Lord Denning MR. See also *Montevideo Gas & Drydock Co v Clan Line* (1921) 37 TLR 866, CA; *Saint Line Ltd v Richardsons Westgarth & Co* [1940] 2 KB 99; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 1 All ER 997, [1949] 1 All ER 997, CA; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, sub nom *Koufos v C Czarnikow Ltd, The Heron II* [1967] 3 All ER 686, HL.

2 *Cory v Thames Ironworks Co* (1868) LR 3 QB 181 (damages awarded for £420, being arbitrator's assessment of hypothetical loss which would have ensued through unavailability of derrick for its most obvious lucrative use, in that of a coal store; no damages at the higher level representing actual loss resulting from unavailability of derrick for special, novel and unexpected use proposed by innocent party but not communicated to party in breach).

3 'The true principle is this, that although the buyer may have sustained a loss from the non-delivery of an article which he intended to apply to a special purpose, and which, if applied to that special purpose would have been productive of a larger amount of profit, the seller cannot be called upon to make good that loss if it was not within the scope of his contemplation that the thing would be applied to the purpose from which such larger profit might result; and although, in point of fact, the buyer does sustain damage to that extent, it would not be reasonable or just that the seller contemplated that, in the event of his not fulfilling his contract by the delivery of the article, the profit which would be realised if the article had been delivered would be lost to the other party, to that extent he ought to pay. The buyer has lost the larger amount, and there can be no hardship or injustice in making the seller liable to compensate him in damages so far as the seller understood and believed that the article would be applied to the ordinary purposes to which it was capable of being applied': *Cory v Thames Ironworks Co* (1868) LR 3 QB 181 at 190 per Cockburn CJ; and see also at 190-191 per Blackburn J.

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**1034. Loss incurred in breach of contract with defendant.**

Loss which a claimant incurs by reason of his own breach of contract towards the contract breaker is necessarily too remote to be recoverable in an action against that contract breaker<sup>1</sup>. Such irrecoverable loss may take the form of liability to a third party with whom the claimant has entered into some transaction prohibited by the contract on which the claimant now sues. Where an employer under a building contract breaks a promise not to assign the benefit of the contract, and by reason of the wrongful assignment incurs liability to the assignee for the contractor's own breaches of the building contract, the assignee being unable to sue the contractor, the measure of the contractor's liability to the employer is not automatically that of the employer's liability to the assignee<sup>2</sup>. Substantial damages may well, however, be recoverable by the employer on other grounds.

<sup>1</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 110, [1993] 3 All ER 417 at 433, HL, per Lord Browne-Wilkinson.

<sup>2</sup> *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 110, [1993] 3 All ER 417 at 433, HL, per Lord Browne-Wilkinson.

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## (ii) Causation

### 1035. Causation requirement.

In addition to the requirement that the plaintiff suffer a loss that is not too remote<sup>1</sup>, for a successful damages claim for breach of contract the breach must also have causally contributed to the damage, that is, there must be a sufficient causal connection between breach and the loss sustained<sup>2</sup>. In this way the law limits liability to consequences which are attributable to the wrongful act or breach of contract<sup>3</sup>. Causation is not dependent on remoteness or immediacy in time<sup>4</sup>. The onus to prove causation is on the plaintiff<sup>5</sup>.

1 As to remoteness see PARA 1015 et seq ante.

2 *Monarch Steamship Co Ltd v Karlshamns Oljefabriker AB* [1949] AC 196, [1949] 1 All ER 1, HL. See also *Sykes v Midland Bank Executor and Trustee Co Ltd* [1971] 1 QB 113, [1970] 2 All ER 471, CA; *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 914, [1995] 1 WLR 1602 at 1609, CA; *British Racing Drivers' Club Ltd v Hextall Erskine & Co (a firm)* [1996] 3 All ER 667 at 671-672, [1997] 1 BCLC 182 at 186-187 per Carnwath J; *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 214, [1996] 3 All ER 365 at 372, HL, per Lord Hoffmann (a case involving a negligent valuation: the Court of Appeal held that the defendant should be liable for the loss which would not have occurred if correct advice was given. In distinguishing that position from what he thought was the true position Lord Hoffmann said: 'I think that one can to some extent generalise the principle... It is that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them'). See further *Stag Line Ltd v Tyne Shiprepair Group Ltd* [1984] 2 Lloyd's Rep 211, [1984] 4 Tr L 33.

3 *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 213, [1996] 3 All ER 365 at 371-372, HL, per Lord Hoffmann.

4 *Monarch Steamship Co Ltd v Karlshamns Oljefabriker AB* [1949] AC 196 at 227, [1949] 1 All ER 1 at 16, HL, per Lord Wright. See also *Stinnes Interoil GmbH v A Halcoussis & Co, The Yanxilas (No 2)* [1984] 1 Lloyd's Rep 676; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1992) 57 BLR 57 at 101-102, CA, per Sir Michael Kerr (revsd without reference to the point [1994] 1 AC 85, [1993] 3 All ER 417, HL).

5 *Wilsher v Essex Area Health Authority* [1988] AC 1074, [1988] 1 All ER 871, HL. See further *Stag Line Ltd v Tyne Shiprepair Group Ltd* [1984] 2 Lloyd's Rep 211, [1984] 4 Tr L 33.

## UPDATE

### 1035 Causation requirement

NOTE 2--See also *One Hundred Old Broad St Ltd v Sidley* [1999] EG 65 (CS), CA.

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### 1036. Test for causation.

The principles involved in causation with respect to contract are the same as those for tort<sup>1</sup>. Causation is determined as a matter of ordinary common sense, being concerned with everyday life, thoughts and expressions rather than with philosophic speculation<sup>2</sup>. The traditional test was the 'but for' test<sup>3</sup>, that is, 'would the damage have accrued but for the defendant's action'<sup>4</sup>. The 'but for' test survives as a guide<sup>5</sup> but has its limitations, in particular, it fails to take account of situations where there are more than one cause or intervening causes<sup>6</sup>.

1 *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137, [1994] 4 All ER 464, CA. See also *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, [1996] 3 All ER 365, HL; *Swindle v Harrison* [1997] PNLR 641, (1997) Times, 17 April, CA.

2 *Monarch Steamship Co Ltd v Karlshamns Oljefabriker AB* [1949] AC 196 at 228, [1949] 1 All ER 1 at 16, HL, per Lord Wright. See also *Leyland Shipping Co Ltd v Norwich Union* [1918] AC 350 at 362, HL, per Lord Dunedin; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1992] 57 BLR 57 at 101, CA, per Sir Michael Kerr (revsd without reference to the point [1994] 1 AC 85, [1993] 3 All ER 417, HL); *Galoo Ltd v Bright Grahame Murray* [1995] 1 All ER 16 at 29, [1994] 1 WLR 1360 at 1375, CA, per Glidewell LJ; *British Racing Drivers' Club Ltd v Hextall Erskine & Co (a firm)* [1996] 3 All ER 667 at 681-682, [1997] 1 BCLC 182 at 197-199 per Carnwath J; *Bank of Credit & Commerce International (Overseas) Ltd v Price Waterhouse (No 3)* [1998] Ch 84, [1997] 4 All ER 781; *Bem Dis A Turk Ticaret S/A TR v International Agri Trade Co Ltd, The Selda* [1998] 1 Lloyd's Rep 416; *Skandia Property (UK) Ltd v Thames Water Utilities Ltd* (1997) 57 ConLR 65. See further *Smith Hogg & Co Ltd v Black Sea Insurance Co Ltd* [1940] AC 997 at 1004, [1940] 3 All ER 405 at 409-410, HL, per Lord Wright; *Yorkshire Dale Steamship Co Ltd v Minister of War Transport, The Coxwold* [1942] AC 691 at 706, [1942] 2 All ER 6 at 15, HL, per Lord Wright; *Heskell v Continental Express Ltd* [1950] 1 All ER 1033; *Total Transport Corp v Arcadia Petroleum Ltd, The Eurys* [1998] 1 Lloyd's Rep 351; *The Sivad* [1998] 2 Lloyd's Rep 97, CA; *Fitzgerald v Penn* (1954) 91 CLR 268 at 277-278 per Dixon CJ; *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310 at 350, 12 ACLR 202, NZ CA, per McHugh JA; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 9 BCL 215, Aust HC; *Bennett v Minister for Community Welfare* (1992) 176 CLR 408 at 412-413, Aust HC; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6, 127 ALR 180 at 183, Aust HC; *Gerrit Wynbergen v Hoyts Corp Pty Ltd* (1997) 72 ALJR 65, Aust HC; *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 154 ALR 361, Aust HC; *Trust Co of Australia v Perpetual Trustees WA Ltd* (1997) 42 NSWLR 237. Cf *Young v Purdy* [1997] PNLR 130, [1997] Fam Law 93, CA.

3 *Galoo Ltd v Bright Grahame Murray* [1995] 1 All ER 16, [1994] 1 WLR 1360, CA; *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310, 12 ACLR 202, NZ CA. See also *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd* (1968) 120 CLR 516, Aust HC.

4 This test has fallen into disfavour in recent times: see *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370, [1966] 2 All ER 283, CA; *Galoo Ltd v Bright Grahame Murray* [1995] 1 All ER 16, [1994] 1 WLR 1360, CA; *Swindle v Harrison* [1997] PNLR 641, (1997) Times, 17 April, CA. See also *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 9 BCL 215, Aust HC; *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310, 12 ACLR 202, NZ CA; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6, 127 ALR 180 at 183, Aust HC.

5 *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310, 12 ACLR 202, NZ CA. See also *Galoo Ltd v Bright Grahame Murray* [1995] 1 All ER 16, [1994] 1 WLR 1360, CA; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 9 BCL 215, Aust HC; *Bennett v Minister for Community Welfare* (1992) 176 CLR 408 at 412-413, Aust HC; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6, 127 ALR 180 at 183, Aust HC; *Gerrit Wynbergen v Hoyts Corp Pty Ltd* (1997) 72 ALJR 65, Aust HC.

6 See *Bennett v Minister for Community Welfare* (1992) 176 CLR 408 at 412-413, Aust HC.

## UPDATE

### 1036 Test for causation

NOTE 5--Where medical science can not establish probability that, but for act of negligence, injury would not have happened, but can establish that contribution of negligent cause was more than negligible, the 'but for' test is modified, and claimant will succeed: *Bailey v Ministry of Defence* [2008] EWCA Civ 883, [2009] 1 WLR 1052, [2008] All ER (D) 382 (Jul).



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(2) LIMITING OR CONSTRAINING FACTORS IN THE RECOVERY OF DAMAGES FOR BREACH OF CONTRACT/(ii) Causation/1037. Issue of fact.

### **1037. Issue of fact.**

Causation is an issue of fact<sup>1</sup>. Where the breach of contract consists of a positive act, causation is determined as a matter of historical fact<sup>2</sup>. The actual assessment of damages may still depend upon future uncertain events. If the breach of contract is one of omission, causation will depend upon what the plaintiff would have done if the breach had not occurred. The plaintiff must prove on the balance of probabilities that he would have taken action to obtain any relevant benefit or avoid any relevant risk if the omission had not occurred<sup>3</sup>. Where the plaintiff's loss depends upon the hypothetical action of a third party, then as a matter of causation, the plaintiff must show that if the breach had not occurred, he had a real or substantial chance (as opposed to a speculative one) of the third party conferring a benefit or acting to avoid a risk to the plaintiff<sup>4</sup>.

1 *Leyland Shipping Co Ltd v Norwich Union* [1918] AC 350 at 362, HL, per Lord Dunedin; *Bennett v Minister for Community Welfare* (1992) 176 CLR 408 at 412-413, Aust HC; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6, 127 ALR 180 at 183, Aust HC.

2 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 914, [1995] 1 WLR 1602 at 1609, CA, per Stuart-Smith LJ.

3 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 915, [1995] 1 WLR 1602 at 1610, CA, per Stuart-Smith LJ.

4 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 All ER 907 at 919, [1995] 1 WLR 1602 at 1614, CA, per Stuart-Smith LJ.

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**1038. Breach must cause loss and not merely provide opportunity for loss.**

It is not sufficient for the breach merely to provide the opportunity or occasion for the plaintiff to injure himself<sup>1</sup>. The breach must cause the loss<sup>2</sup> and causation may turn on whether the defendant's breach has done more than provide such an opportunity or occasion<sup>3</sup>. Causation is not negated simply because the damage would not have occurred without an extraneous event, the issue is whether the damage would not have been likely to happen if the breach had not occurred<sup>4</sup>. If some extraneous event was not likely to occur as a result of the breach, the assessment of damages for the breach will depend upon whether any loss did accrue from the breach<sup>5</sup>.

1 *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370 at 391, [1966] 2 All ER 283 at 287, CA, per Sellers LJ, and at 394-395 and 289 per Salmon LJ; *Brown v KMR Services Ltd* [1994] 4 All ER 385 at 398 per Gatehouse J (affd without reference to the point [1995] 4 All ER 598, [1995] 2 Lloyd's Rep 513, CA); *Galoo Ltd v Bright Grahame Murray* [1995] 1 All ER 16 at 29, [1994] 1 WLR 1360 at 1374, CA, per Glidewell LJ; *Young v Purdy* [1997] PNL 130, [1997] Fam Law 93, CA; *Swindle v Harrison* [1997] PNL 641, (1997) Times, 17 April, CA; *The Sivand* [1998] 2 Lloyd's Rep 97, CA. See also *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310, 12 ACLR 202, NZ CA; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 9 BCL 215, Aust HC; *Virgin Management Ltd v DeMorgan Group plc* [1996] NPC 8, [1994] 45 ConLR 28, CA.

2 *Monarch Steamship Co Ltd v Karlshamns Oljefabriker AB* [1949] AC 196 at 227-228, [1949] 1 All ER 1 at 16, HL, per Lord Wright; *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 212-213, [1996] 3 All ER 365 at 371, HL, per Lord Hoffmann.

3 This is a matter on which opinions may differ on the same facts: compare *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 212-213, [1996] 3 All ER 365 at 371, HL, per Lord Hoffmann with *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375 at 420-421, [1995] 2 All ER 769 at 855, CA, per Sir Thomas Bingham MR.

4 *Smith Hogg & Co Ltd v Black Sea Insurance Co Ltd* [1940] AC 997 at 1005, [1940] 3 All ER 405 at 409-410, HL, per Lord Wright; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6, 127 ALR 180 at 183, Aust HC. Cf *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 212-213, [1996] 3 All ER 365 at 371, HL, per Lord Hoffmann.

5 See *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137, [1994] 4 All ER 464, CA. See also *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 212-213, [1996] 3 All ER 365 at 371, HL, per Lord Hoffmann. Cf *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375 at 420-421, [1995] 2 All ER 769 at 855, CA, per Sir Thomas Bingham MR.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(2) LIMITING OR CONSTRAINING FACTORS IN THE RECOVERY OF DAMAGES FOR BREACH OF CONTRACT/(ii) Causation/1039. Multiple causes.

### 1039. Multiple causes.

Causation is made out if the breach was a cause of the loss<sup>1</sup>. Causation is not made out if, despite there being a breach of contract, some other event is the only real or effective cause of the loss in question, whether or not it breaks the chain of causation<sup>2</sup>. Another view propounds that if the breach of contract is only one of two causes of the loss<sup>3</sup> then so long as both causes co-operate to bring about the loss with 'equal efficacy', it is sufficient 'to carry judgment for damages'<sup>4</sup>. On this view the breach of contract would have to be the 'equal', 'decisive' or 'dominant' cause of the loss<sup>5</sup>. This view was not, however, expressed as necessarily being the 'true rule of causation'<sup>6</sup>. The first view takes account of the modern law on contribution<sup>7</sup>, and suggests that the use of words such as 'decisive' and 'dominant' are only meant to prevent an action being brought where the breach itself only minimally contributes to the damage<sup>8</sup>.

Under either test, a claim for damages will not arise, despite the existence of a breach of contract, if the loss suffered is independently caused by an event the party in breach has no control over or has not accepted responsibility for<sup>9</sup>, even if (assuming the extraneous event breaks the chain of causation) the same loss would have accrued without the extraneous event<sup>10</sup>. Similarly, if the loss is predominantly caused by the breach of duty of some third party for whom the party in breach of contract is not responsible, damages will not be recoverable from the party in breach<sup>11</sup>. If, however, the loss derives from both the breach of contract and the act of some third party or some extraneous event, the party in breach will be liable for the loss if the act of the third party or the extraneous event was foreseeable<sup>12</sup>.

1 See *Smith Hogg & Co Ltd v Black Sea Insurance Co Ltd* [1940] AC 997 at 1007, [1940] 3 All ER 405 at 411, HL, per Lord Wright. See further *Brown v KMR Services Ltd* [1994] 4 All ER 385 at 398 per Gatehouse J (affd and overruled in part without reference to the point [1995] 4 All ER 598, CA); *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375 at 406, [1995] 2 All ER 769 at 842, CA, per Sir Thomas Bingham MR (revsd without reference to the point [1997] AC 191, [1996] 3 All ER 365, HL); *British Racing Drivers' Club Ltd v Hextall Erskine & Co (a firm)* [1996] 3 All ER 667 at 681, [1997] 1 BCLC 182 at 197 per Carnwath J; *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310 at 352, 355, 12 ACLR 202 at 240, NZ CA, per McHugh JA.

2 See *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, [1996] 3 All ER 365, HL; *Trust Co of Australia v Perpetual Trustees WA Ltd* (1997) 42 NSWLR 237. See also *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1992] 57 BLR 57 at 101, CA, per Sir Michael Kerr (revsd without reference to the point [1994] 1 AC 85, [1993] 3 All ER 417, HL); *Bennett v Minister for Community Welfare* (1992) 176 CLR 408, Aust HC.

3 See eg *Muhammed Issa el Sheik Ahmad v Ali* [1947] AC 414, [1948] LJR 455, PC (loss caused through breach and plaintiff's own lack of means); cf *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA; *Robbins of Putney Ltd v Meek* [1971] RTR 345.

4 *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 at 1048 per Devlin J. See also *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 at 813-814, [1989] 2 All ER 952 at 1021, CA, per Slade LJ; affd without reference to the point [1991] 2 AC 249, [1990] 2 All ER 947, HL. See further Treitel *The Law of Contract* (9th Edn, 1995) pp 879-880.

5 *Monarch Steamship Co Ltd v Karlshamns Oljefabrik AB* [1949] AC 196 at 227, [1949] 1 All ER 1 at 16, HL, per Lord Wright; *Yorkshire Dale Steamship Co Ltd v Minister of War Transport, The Coxwold* [1942] AC 691 at 698, [1942] 2 All ER 6 at 9-10, HL, per Viscount Simon LC; *Galoo Ltd v Bright Grahame Murray* [1995] 1 All ER 16 at 29, [1994] 1 WLR 1360 at 1374, CA, per Glidewell LJ. See also *Gray v Barr* [1971] 2 QB 554, [1971] 2 All ER 949, CA; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1992) 57 BLR 57 at 101, CA, per Sir Michael Kerr (revsd without reference to the point [1994] 1 AC 85, [1993] 3 All ER 417, HL). Cf *Smith Hogg & Co Ltd v Black Sea Insurance Co Ltd* [1940] AC 997 at 1006, [1940] 3 All ER 405 at 409-410, HL, per Lord Wright.

See further *Alexander v Cambridge Credit Corp Ltd* (1987) 9 NSWLR 310 at 315, 353-358, 12 ACLR 202 at 240-245, NZ CA, per McHugh JA.

6 *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 at 1048 per Devlin J.

7 See *Gerrit Wynbergen v Hoyts Corp Pty Ltd* (1997) 72 ALJR 65 at 69, Aust HC, per Hayne J; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 9 BCL 215, Aust HC.

8 References to the 'effective', 'proximate', 'predominant', 'substantial' or 'efficient' cause may in the circumstances simply be making the point that that cause is the only cause of the loss: see eg *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1992) 57 BLR 57 at 101, CA, per Sir Michael Kerr; revsd without reference to the point [1994] 1 AC 85, [1993] 3 All ER 417, HL.

9 *Liesbosch Dredger v SS Edison* [1933] AC 449, HL (loss flowing from plaintiff's impecuniosity independently caused and distinct from loss flowing from tortious act of defendant).

10 *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137, [1994] 4 All ER 464, CA.

11 *Galoo v Bright Grahame Murray* [1995] 1 All ER 16, [1994] 1 WLR 1360, CA. See also *Weld-Blundell v Stephens* [1920] AC 956, HL.

12 *Silver Coast Shipping Co Ltd v Union Nationale des Co-operatives Agricoles des Cereales* [1981] 2 Lloyd's Rep 95. See also *The Wilhelm* (1866) 14 LT 636; *De la Bere v Pearson Ltd* [1908] 1 KB 280, CA; *Stansbie v Troman* [1948] 2 KB 48, [1948] 1 All ER 599, CA; *Monarch Steamship Co Ltd v Karlshamms Oljefabriker AB* [1949] AC 196, [1949] 1 All ER 1, HL; *Stinnes Interfoil GmbH v A Halcoussis & Co (No 2)* [1984] 1 Lloyd's Rep 676. Cf *Weld-Blundell v Stephens* [1920] AC 956, HL; *Clark v Kirby-Smith* [1964] Ch 506, [1964] 2 All ER 835; *T v Surrey County Council* [1994] 4 All ER 577, (1994) Times, 27 January; *Young v Purdy* [1997] PNL 130, [1997] Fam Law 93, CA; *British Racing Drivers' Club Ltd v Hextal Erskine & Co* [1996] 3 All ER 667, [1997] 1 BCLC 182; *The Sivand* [1998] 2 Lloyd's Rep 97, CA. See further *Total Transport Corp v Arcadia Petroleum Ltd*, *The Eurys* [1998] 1 Lloyd's Rep 351 at 362, CA, per Staughton LJ; *Quinn v Burch Brothers (Builders) Ltd* [1966] 2 QB 370 at 394, CA, per Salmon LJ (comment on the relevance of foreseeability to causation). See also PARA 1015 et seq ante.

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#### 1040. Breaks in the chain of causation.

The chain of causation is broken where an unforeseeable extraneous event occurring after the breach has the effect of preventing any loss, or any further loss, accruing from the breach<sup>1</sup>. This is distinct from where a breach of contract exists but all or part of the loss suffered is caused by some extraneous event. In this latter case there is a co-existing network of causes where the extraneous event may occur before or contemporaneously with the breach of contract<sup>2</sup>. However, it could also occur after the breach of contract and not break the chain of causation if it does not end the accrual of loss attributable to the breach of contract, for example, if it was foreseeable<sup>3</sup>, if the breach of contract was a contributing cause of the intervening act<sup>4</sup>, or if the party in breach was under a duty to prevent the extraneous event happening<sup>5</sup>. The relevant issue is whether the extraneous event was the 'new and independent cause' of further damage accruing (or of all the damage accruing if none had accrued up to that point)<sup>6</sup> or whether damage continued to accrue from both the breach of contract and the extraneous event (even though the extraneous cause may take over as the more immediate cause)<sup>7</sup> or only from the breach of contract<sup>8</sup>. Ultimately, this issue must be determined as a matter of common sense<sup>9</sup>. The extraneous event which breaks the chain of causation may be an act of nature<sup>10</sup>, an act of some third party<sup>11</sup> or even an act by the plaintiff<sup>12</sup>.

If no loss accrued between the breach of contract and the event that broke the chain of causation, then the promisor will only be liable for nominal damages<sup>13</sup>. In other cases the promisor will be liable for that damage which accrued prior to the event which broke the chain of causation<sup>14</sup>.

1 See eg *Lambert v Lewis* [1982] AC 225, [1981] 1 All ER 1185, HL (defective coupling supplied in breach of contract, all loss attributable to continued use of coupling after notice of the defect); *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370, [1966] 2 All ER 283, CA (defendant's breach of contract in failing to supply step-ladder not the cause of loss which resulted from plaintiff choosing to use folded trestle); *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137, [1994] 4 All ER 464, CA (loss arising from explosion of defective heat exchanger caused by plaintiff's continued use after discovering latent defect); *Young v Purdy* [1997] PNLR 130, [1997] Fam Law 93, CA (client lodging defective application breaking chain of causation that may have ensued from solicitor wrongfully ceasing to act). Cf *Monarch Steamship Co Ltd v Karlshamms Oljefabriker AB* [1949] AC 196, [1949] 1 All ER 1, HL (diversion of ship by admiralty due to outbreak of war not breaking chain of causation in respect of loss suffered from delay in supplying unseaworthy ship).

2 See *Total Transport Corp v Arcadia Petroleum Ltd, The Eurys* [1998] 1 Lloyd's Rep 351 at 362, CA, per Staughton LJ.

3 See PARA 1015 et seq ante. Cf *Weld-Blundell v Stephens* [1920] AC 956, HL.

4 *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6, 127 ALR 180 at 183, Aust HC.

5 *Cobb v Great Western Rly* [1894] AC 419, HL; *De Le Bere v Pearson* [1908] 1 KB 280, CA; *London Joint Stock Bank v Macmillan* [1918] AC 777, HL; *Stansbie v Troman* [1948] 2 KB 48, [1948] 1 All ER 599, CA; *Commonwealth Trading Bank of Australia v Sydney Wide Stores Pty Ltd* (1981) 55 ALJR 574, 35 ALR 513, Aust HC; *British Racing Drivers' Club Ltd v Hextall Erskine & Co (a firm)* [1996] 3 All ER 667, [1997] 1 BCLC 182. See also *P Perl (Exporters) Ltd v Camden London Borough Council* [1984] QB 342 at 357, [1983] 3 All ER 161 at 170, CA, per Oliver LJ.

6 *Weld-Blundell v Stephens* [1920] AC 956 at 986, HL. See also *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1952] AC 292, [1952] 1 All ER 20, HL; *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137, [1994] 4 All ER 464, CA.

7 *Rouse v Squires* [1973] QB 889 at 898, [1973] 2 All ER 903 at 610, CA, per Cairns LJ.

8 *Smith Hogg & Co Ltd v Black Sea Insurance Co Ltd* [1940] AC 997 at 1003, [1940] 3 All ER 405 at 409, HL, per Lord Wright. See also *Monarch Steamship Co Ltd v Karlshamms Oljefabriker AB* [1949] AC 196, [1949] 1 All ER 1, HL; *Cook v S* [1966] 1 All ER 248, [1966] 1 WLR 635 (affd [1967] 1 All ER 299, [1967] 1 WLR 457, CA); *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] AC 406, [1965] 3 All ER 619, HL; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Burmuda) Ltd* [1992] 1 AC 233, [1991] 3 All ER 1, HL; *Bennett v Minister for Community Welfare* (1992) 176 CLR 408, Aust HC. Cf *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1952] AC 292, [1952] 1 All ER 20, HL.

9 *Total Transport Corp v Arcadia Petroleum Ltd, The Eurys* [1998] 1 Lloyd's Rep 351 at 361, CA, per Staughton LJ (pointing out the limits of the chain metaphor). See also the authorities cited in para 1036 note 2 ante.

10 *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1952] AC 292, [1952] 1 All ER 20, HL.

11 *Weld-Blundell v Stephens* [1920] AC 956, HL.

12 *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370, [1966] 2 All ER 283, CA; *O'Connor v BDB Kirby & Co* [1972] 1 QB 90, [1971] 2 All ER 1415, CA; *Sole v WJ Hallt Ltd* [1973] QB 574, [1973] 1 All ER 1032; *Lambert v Lewis* [1982] AC 225, [1981] 1 All ER 1185, HL; *Young v Purdy* [1997] PNL 130, [1997] Fam Law 93, CA. Cf *Cia Naviera Maropan SA v Bowaters Lloyds Pulp and Paper Mills Ltd* [1955] 2 QB 68, [1955] 2 All ER 241, CA; *Reardon Smith Line Ltd v Australian Wheat Board* [1956] AC 266, [1956] 1 All ER 456, PC. See also *Blue Circle Industries plc v Ministry of Defence* [1998] 3 All ER 385, CA (chain of causation coming to an end principally due to the act of the defendant in cleaning up land it had contaminated). See further *Tennant Radiant Heat Ltd v Warrington Development Corp* (1988) 11 EG 71, [1988] 1 EGLR 41, CA (causation apportioned).

13 *Weld-Blundell v Stephens* [1920] AC 956, HL.

14 *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137, [1994] 4 All ER 464, CA. See also *Associated Portland Cement Manufacturers (1900) Ltd v Houlder Bros & Co Ltd* (1917) 86 LJB 1495, 118 LT 94.

## UPDATE

### 1040 Breaks in the chain of causation

NOTE 5--*British Racing Drivers' Club*, cited, distinguished: *National Westminster Bank plc v Rabobank Nederland* [2007] EWHC 1742 (Comm), [2008] 1 All ER (Comm) 266.

NOTE 12--See also *Vinmar International Ltd v Theresa Navigation SA* [2001] All ER (Comm) 243 (decision by claimant to continue loading cargo in knowledge that defendant's vessel unsuitable did not break chain of causation; defendant's breach in failing to care for cargo remained effective cause of loss).

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### (iii) Mitigation

#### 1041. Plaintiff's duty to mitigate loss.

The plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant's wrong, and, if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided<sup>1</sup>. Where the plaintiff does mitigate his loss he cannot recover damages in respect of that avoided loss even if the steps he took to avoid the loss are characterised as being more than what was reasonably necessary<sup>2</sup>. The duty only arises upon the commission of a tort<sup>3</sup> or breach of contract. In the case of a contract there is no duty to mitigate before a breach has occurred<sup>4</sup>. Thus if a defendant repudiates a contract, in the sense of evincing an intention not to perform his obligations under it, there is no duty upon the plaintiff to mitigate his loss until either the plaintiff has accepted the repudiation and thereby treated the contract as at an end, or the time for performance by the defendant has arrived<sup>5</sup>.

Where a defendant alleges that the plaintiff has failed to take all reasonable steps to mitigate his loss the burden of proof is upon the defendant<sup>6</sup>.

If, in taking reasonable steps to mitigate his loss, the plaintiff incurs expenses<sup>7</sup> or further loss<sup>8</sup>, he may recover such expenses and further loss from the defendant, even if the resulting damage is greater than it would have been had the mitigating steps not been taken.

1 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Ry Co of London Ltd*[1912] AC 673 at 689, HL, per Viscount Haldane LC; *Jamal v Moolla Dawood, Sons & Co*[1916] 1 AC 175 at 179, PC; *Moller v Jecks* (1865) 19 CBNS 332 at 340; *Brown v Muller* (1872) LR 7 Ex Ch 319 at 322 per Kelly CB; *Frost v Knight*(1872) LR 7 Exch 111 at 115 per Cockburn CJ; *Dunkirk Colliery Co v Lever* (1879) 41 LT 633, CA; *Credito Italiano v Swiss Bankverein* (1916) 114 LT 776 at 778, CA; *Payzu Ltd v Saunders*[1919] 2 KB 581 at 588, CA, per Banks LJ; *Moore v DER Ltd*[1971] 3 All ER 517, [1971] 1 WLR 1476, CA. However, the profits from the sale of land purchased in reliance on a misrepresentation need not be set off against the loss suffered as a result of that misrepresentation and the reliance on it: *Hussey v Eels*[1990] 2 QB 227, [1990] 1 All ER 449, CA; distinguishing *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Ry Co of London Ltd* supra. In *Hussey v Eels* supra the purchaser of a bungalow suffering from subsidence was under no duty to obtain planning permission for the construction of new houses on the land and the profit made on the sale of the land was not to be deducted from the damages. Where a purchaser seeks damages for breach of contract for sale with vacant possession, he is not bound to mitigate his damages by accepting the vendor's offer to take on reconveyance of the property: *Strutt v Whitnell*[1975] 2 All ER 510, [1975] 1 WLR 870, CA; distinguishing *Payzu Ltd v Saunders* supra. As to misrepresentation see generally MISREPRESENTATION AND FRAUD.

2 See *Chitty on Contracts* (27th Edn, 1994) PARAS 26-050, 26-055.

3 As to damages in tort see PARA 851 et seq ante.

4 *White and Carter (Councils) Ltd v McGregor*[1962] AC 413, [1961] 3 All ER 1178, HL; *Anglo-African Shipping Co v J Mortner Ltd* [1962] 1 Lloyd's Rep 81 (revsd [1962] 1 Lloyd's Rep 610, CA).

5 *White and Carter (Councils) Ltd v McGregor*[1962] AC 413, [1961] 3 All ER 1178, HL; *Anglo-African Shipping Co v J Mortner Ltd* [1962] 1 Lloyd's Rep 81 (revsd [1962] 1 Lloyd's Rep 610, CA); *Leigh v Paterson* (1818) 8 Taunt 540; *Brown v Muller* (1872) LR 7 Ex Ch 319; *Michael v Hart & Co*[1902] 1 KB 482, CA; *Melachrine v Nickoll and Knight*[1920] 1 KB 693. Although generally the innocent party has an absolute discretion as to whether to accept the repudiation of a contract, where he has no legitimate interest in performing the contract, rather than claiming damages, the court will not allow him to enforce his full contractual rights: *Clea Shipping Corp v Bulk Oil International*[1984] 1 All ER 129, [1983] 2 Lloyd's Rep 645. See further *Stoczna Gdanska SA v*

*Latvian Shipping Co* [1997] 2 Lloyd's Rep 228; affd on other grounds [1998] 1 WLR 574, HL, especially at 593-594 per Lord Goff of Chieveley. As to repudiation of a contract see CONTRACT vol 9(1) (Reissue) PARA 997 et seq.

6 *Roper v Johnson* (1873) LR 8 CP 167 at 181 per Brett J; *James Finlay & Co v NV Kwik Hoo Tong Handel Maatschappij* [1928] 2 KB 604 at 614 per Wright J (affd [1929] 1 KB 400, CA).

7 *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 at 506, HL, per Lord Macmillan; *Cazalet v Morris & Co* 1916 SC 952 (expenses of hiring lighters to unload plaintiff's ship to avoid delay); *Hales v London and North Western Ry Co* (1863) 4 B & S 66 (expense of unsuccessful search for goods delayed in delivery); *Lloyds and Scottish Finance Ltd v Modern Cars and Caravans (Kingston) Ltd* [1966] 1 QB 764, [1964] 2 All ER 732 (damages for breach of warranty on sale of caravan included costs of interpleader proceedings taken in attempt to mitigate plaintiff's loss); *Hoffberger v Ascot International Bloodstock Bureau* (1976) 120 Sol Jo 130, CA (expenses of keeping house after defendants broke contract to purchase it, in the hope of selling advantageously); *Rumsey v Owen, White and Catlin* (1977) 245 EG 225, [1977] EGLR 728, CA (entering into second agreement in respect of the property had been a reasonable remedial measure although it unfortunately proved costly); *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397; *Daily Office Cleaning Contracts Ltd v Shefford* [1977] RTR 361. See also *The Sivand* [1998] 2 Lloyd's Rep 97 at 108, CA, per Hobhouse LJ.

8 Eg an unsuccessful medical operation. Cf *Bloor v Liverpool Derricking and Carrying Co Ltd* [1936] 3 All ER 399, CA, where the administration of an anaesthetic under which the deceased died was held not to amount to a novus actus interveniens, but the action failed on other grounds. As to damages in tort see further PARA 851 et seq ante.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(2) LIMITING OR CONSTRAINING FACTORS IN THE RECOVERY OF DAMAGES FOR BREACH OF CONTRACT/(iii) Mitigation/1042. Standard of conduct required of the plaintiff.

#### **1042. Standard of conduct required of the plaintiff.**

The plaintiff is required only to act reasonably, and whether he has done so is a question of fact in the circumstances of each particular case, and not a question of law<sup>1</sup>. He must act not only in his own interests but also in the interests of the defendant and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter<sup>2</sup>. One test of reasonableness is whether a prudent man would have acted in the same way if the original wrongful act had arisen through his own default<sup>3</sup>. In cases of breach of contract the plaintiff is under no obligation to do anything other than in the ordinary course of business<sup>4</sup>, and where he has been placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the defendant whose breach of contract has occasioned the difficulty<sup>5</sup>. Similar principles apply in tort<sup>6</sup>.

Although it may be reasonable to require the plaintiff to expend money in mitigating his loss, as for instance in carrying out repairs to a damaged article or hiring a substitute, he is not obliged to risk his money too far<sup>7</sup>. He need not seek to recover compensation from a third party who, in addition to the defendant, is also liable to him<sup>8</sup>, and he need not seek to lessen his loss by embarking on complicated and difficult litigation against a third party, even if he is given an indemnity as to costs by the defendant<sup>9</sup>. Furthermore, it seems that the plaintiff's impecuniosity or financial weakness may properly be taken into account in deciding whether he has acted reasonably<sup>10</sup>.

The plaintiff is under no obligation to destroy his own property<sup>11</sup>, or to injure himself or his commercial reputation<sup>12</sup>, to reduce the damages payable by the defendant. Furthermore, the plaintiff need not take steps which would injure innocent persons<sup>13</sup>.

A plaintiff will not be held to have acted unreasonably if he was ignorant of mitigating steps available to him<sup>14</sup>.

1 *Payzu Ltd v Saunders* [1919] 2 KB 581 at 588, CA, per Bankes LJ, and at 589 per Scrutton LJ; *Moore v DER Ltd* [1971] 3 All ER 517, [1971] 1 WLR 1476, CA; *AEG (UK) Ltd v Logic Resources Ltd* [1996] CLC 265, CA. See also *Virgin Management Ltd v De Morgan Group plc* [1996] NPC 8, [1994] 45 ConLR 28, CA (failure to seek rectification in some circumstances may amount to a failure to take reasonable steps to mitigate).

2 *Smailes & Son v Hans Dessen & Co* (1905) 94 LT 492 at 493 per Channell J (on appeal (1906) 95 LT 809, CA). See also *East v Walter Russell Ltd* (19 June 1997, unreported), Bury County Court (plaintiff's course of action held not to have been that of a prudent person).

3 *Le Blanche v London and North Western Ry Co* (1876) 1 CPD 286 at 313, CA, per Mellish LJ.

4 *Dunkirk Colliery Co v Lever* (1878) 9 ChD 20 at 25, CA, per James LJ; approved in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Ry Co of London Ltd* [1912] AC 673 at 689, HL, per Viscount Haldane.

5 *Banco de Portugal v Waterlow* [1932] AC 452 at 506, HL, per Lord Macmillan; *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397.

6 See *Moore v DER Ltd* [1971] 3 All ER 517, [1971] 1 WLR 1476, CA, where the plaintiff's car became a total loss by the negligence of the defendants' employee. The plaintiff, who needed a reliable car for his professional purposes, ordered a new car, delivery of which was delayed by labour troubles, so he hired a car in the interim, the full cost of the hiring being recoverable from the defendants even though the plaintiff could have shortened the hiring by buying a second hand car. A plaintiff who suffers damage to a prestige motor car is entitled to hire a prestige substitute whilst repairs are taking place: *Daily Office Cleaning Contractors Ltd v Sheffors* [1977] RTR 361. See also *Mattocks v Mann* (1993) RTR 13, (1992) Times, 19 June, CA. Where premises were damaged and

machinery destroyed in a fire, the measure of damage (in the circumstances of the case) was the cost of replacing the building and of buying new machinery (there being no source of second hand machines): *Dominion Mosaics & Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246, [1989] 1 EGLR 164, CA. See also *Hussey v Eels* [1990] 2 QB 227, [1990] 1 All ER 449, CA. As to damages in tort see PARA 851 et seq ante.

7 *Jewelowski v Propp* [1944] KB 510, [1944] 1 All ER 483 (damages for fraudulent misrepresentation were not reduced by the amount by which the plaintiff had mitigated his loss by personal expenditure, because a plaintiff cannot be called upon to spend money in order to minimise such damages). See also *Lesters Leather and Skin Co Ltd v Home and Overseas Brokers Ltd* [1948] WN 437, 82 Ll L Rep 202, CA. As to whether the measure of damages where a surveyor's report negligently fails to disclose defects in a property is the cost of repair, rather than the diminution in value of the property, and whether it was reasonable in the circumstances for the plaintiff not to have carried out the repairs immediately, see *Perry v Sidney Phillips & Son* [1982] 1 All ER 1005 (on appeal [1982] 3 All ER 705, [1982] 1 WLR 1297, CA); *Gardner v Marsh & Parsons* [1997] 3 All ER 871, [1997] 1 WLR 489, CA; and PARA 1058 post. As to fraudulent misrepresentation see generally MISREPRESENTATION AND FRAUD. As to negligent reports by surveyors see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 305.

8 *The Liverpool (No 2)* [1963] P 64 at 83, [1960] 3 All ER 307 at 312, CA, per Harman LJ.

9 *Pilkington v Wood* [1953] Ch 770, [1953] 2 All ER 810 (owing to his solicitor's negligence, a house purchaser found that he had acquired a defective title, and sustained damage on an attempted resale; held that he was not required, before suing the solicitor, to sue the vendor for breach of covenant of title). A lender may be entitled to recover from a valuer for a negligent valuation of a property not just the difference between the amount lent in reliance on the negligent valuation and the amount that would have been lent on a proper valuation, but rather the amount of expense and loss sustained by the lender as a result of the negligent valuation; and in these circumstances the lender may not be obliged to mitigate its loss by enforcing the borrower's personal covenant: *London and South of England Building Society v Stone* [1983] 3 All ER 105, [1983] 1 WLR 1242, CA; and see PARAS 826 ante, 1058 post.

10 See *Robbins of Putney v Meek* [1971] RTR 345; *Clippens Oil Co Ltd v Edinburgh and District Water Trustees* [1907] AC 291 at 303, HL, per Lord Collins; cf *Martindale v Duncan* [1973] 2 All ER 355 at 358, [1973] 1 WLR 574 at 577, CA, per Davies LJ; *Liesbosch Dredger v SS Edison* [1933] AC 449, HL; *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397. Damages reflecting the cost of remedying damage to a building tortiously caused may be assessed with reference to the cost at the date of trial where it is reasonable for the plaintiffs to have postponed the repairs: *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433, CA. As to the effect of impecuniosity on the measure of damages see PARAS 1045-1046 post.

11 *Elliott Steam Tug Co Ltd v Shipping Controller* [1922] 1 KB 127 at 140, CA, per Scrutton LJ (at common law the owner of a ship, while under a duty to act reasonably to reduce damages, is under no obligation to destroy his own property to reduce the damages payable by the wrongdoer); cf *Andrew Weir & Co v Dobell & Co* [1916] 1 KB 722.

12 *James Finlay & Co v NV Kwik Hoo Tong Handel Maatschappij* [1929] 1 KB 400 at 418, CA, per Sankey LJ (a person is not obliged to minimise damages on behalf of another who has broken his contract, if by doing so he would have injured his commercial reputation by getting a bad name in the trade); *Banco de Portugal v Waterlow & Sons Ltd* (1931) 47 TLR 359 at 361, CA, per Scrutton LJ (the plaintiff is not bound to injure himself, his character, his business or his property to lessen the injury caused by the wrongdoer); on appeal sub nom *Banco de Portugal v Waterlow & Sons, Waterlow & Sons v Banco de Portugal* [1932] AC 452 at 471, HL, per Lord Sankey LC.

13 *Banco de Portugal v Waterlow & Sons, Waterlow & Sons v Banco de Portugal* [1932] AC 452 at 471, HL, per Lord Sankey LC. See also *London and South of England Building Society v Stone* [1983] 3 All ER 105, [1983] 1 WLR 1242, CA.

14 *Eley v Bedford* [1972] 1 QB 155, [1971] 3 All ER 285 (plaintiff ignorant of her right to claim disablement benefit).

## UPDATE

### 1042 Standard of conduct required of the plaintiff

NOTE 1--The test for mitigation in a deceit case is the same as that for contract or tort: *Standard Chartered Bank v Pakistan National Shipping Corp* [2001] EWCA Civ 55, [2001] 1 All ER (Comm) 822.



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### **1043. Examples of mitigation.**

In actions relating to the sale of goods it is frequently the plaintiff's duty, where there is an available market<sup>1</sup>, to mitigate his loss by going into the market and buying or selling as the case may be. There is, however, no duty to go into the market before a breach has occurred, and therefore a plaintiff who has not accepted a repudiation by the defendant need take no mitigating steps until the time for performance has arrived, even though the market may be rising or falling to the defendant's detriment<sup>2</sup>. Furthermore, a defendant cannot rely upon this form of mitigation if it would only produce an apparent and not a real diminution of the plaintiff's loss<sup>3</sup>. It may also be the plaintiff's duty to mitigate his loss by accepting an offer by the defendant to supply the goods on different terms<sup>4</sup>, or, where the goods do not comply with the contract terms, to buy them back<sup>5</sup>. Where, however, a vendor of a property fails to give vacant possession, the purchaser is not bound to mitigate his damages by accepting the vendor's offer to repurchase the property<sup>6</sup>.

In actions for breach of a contract of employment a plaintiff who has been wrongfully dismissed must take reasonable steps to obtain other suitable employment<sup>7</sup>. He is not entitled to remain idle at the defendant's expense simply because no precisely similar employment can be found, but must accept employment which, having regard to his standing, experience and personal history he can reasonably be expected to accept<sup>8</sup>. He must be prepared if necessary to lower his sights and accept employment at a lower remuneration<sup>9</sup>. Where the defendant himself offers the plaintiff alternative employment<sup>10</sup> it may be reasonable for the plaintiff to refuse the employment offered if this would involve a reduction in status or, having regard to the dispute between the parties, he could not reasonably be expected to work for the defendant again<sup>11</sup>.

Where a plaintiff claims damages for personal injuries<sup>12</sup> it is his duty to mitigate his loss by obtaining proper medical treatment, and he is not entitled to damages in respect of any pain, suffering, loss of amenities or loss of earnings consequent upon his unreasonable refusal to undergo medical treatment or surgical operations<sup>13</sup>. It is not unreasonable to refuse to undergo an operation which involves serious risk or one in respect of which there is a conflict of medical opinion<sup>14</sup>. Similarly, where a plaintiff retards his recovery by unreasonable conduct he cannot claim damages for loss consequent upon such conduct<sup>15</sup>.

Where the plaintiff's property has been damaged the cost of repairs is the normal measure of damages. If, however, the cost of such repairs will exceed the value of the property the plaintiff must mitigate his loss by replacing the property, and if he chooses to repair his property none the less he can only recover the cost of a replacement from the defendant<sup>16</sup>. This rule does not apply where the property concerned is irreplaceable<sup>17</sup>.

1 As to the general measure of damages for non-acceptance or non-delivery of goods where there is an available market for the goods see the Sale of Goods Act 1979 ss 50(3), 51(3), which provide that, where there is such a market, the measure of damages is to be prima facie ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or delivered or, if no time was fixed, at the time of refusal to accept or deliver as the case may be. See further PARA 1056 post; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 289, 294, 360.

2 *Leigh v Paterson* (1818) 8 Taunt 540; *Brown v Muller* (1872) LR 7 Ex Ch 319; *Michael v Hart & Co* [1902] 1 KB 482, CA (affd sub nom *Hart & Co v Michael*) (1903) 89 LT 422, HL). It may be otherwise where the plaintiff has accepted the repudiation: see *Roper v Johnson* (1873) LR 8 CP 167; *Melachrino v Nickoll and Knight* [1920] 1 KB 693; *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd* [1968] AC 1130n at 1140, [1967] 2 All ER 353 at

360, HL, per Lord Pearson. See further PARA 1056 post; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 300.

3 *Re Vic Mill Ltd* [1913] 1 Ch 465 at 473, CA, per Hamilton LJ (seller's loss of profit on the sale of machinery following buyer's non-acceptance of the machinery was not diminished by the fact that the seller had adapted the machinery and used it to satisfy the order of another customer; the fallacy is in supposing that the seller would not have had both customers, both orders, and both profits); *WL Thompson Ltd v Robinson (Gunmakers) Ltd* [1955] Ch 177, [1955] 1 All ER 154. Cf *Lazenby Garages v Wright* [1976] 2 All ER 770, [1976] 1 WLR 459, CA, in which it was held that a second hand car which the plaintiff had subsequently sold to a third party for more than the defendant had agreed, and then failed to buy it for, was a unique item, and the plaintiff had therefore suffered no loss on the transaction (*WL Thompson v Robinson (Gunmakers) Ltd* supra, distinguished); cf *Charter v Sullivan* [1957] 2 QB 117, [1957] 1 All ER 809, CA. See also *Interoffice Telephones v Robert Freeman & Co Ltd* [1958] 1 QB 190, [1957] 3 All ER 479, CA (a case of hire).

4 *Payzu Ltd v Saunders* [1919] 2 KB 581, CA (offer to supply goods against cash whereas the contract had provided for credit). But where a buyer has rightly rejected goods on the ground of defective quality he is not obliged to accept them if offered in mitigation at a lower price: *Heaven and Kesterton Ltd v Etablissements Francois Albiac et Cie* [1956] 2 Lloyd's Rep 316. If, however, they have been rejected for reasons unconnected with quality and they are so offered, the offer has to be taken into consideration in determining whether the buyer has acted reasonably in mitigating damage: *Heaven and Kesterton Ltd v Etablissements Francois Albiac et Cie* supra at 321 per Devlin J.

5 *Houndsditch Warehouses Co Ltd v Waltex Ltd* [1944] KB 579, [1944] 2 All ER 518.

6 *Strutt v Whitnell* [1975] 2 All ER 510, [1975] 1 WLR 870, CA; distinguishing *Payzu Ltd v Saunders* [1919] 2 KB 581, CA.

7 *Brace v Calder* [1895] 2 QB 253, CA; *Shindler v Northern Raincoat Co Ltd* [1960] 2 All ER 239, [1960] 1 WLR 1038; *Yetton v Eastwoods Froy Ltd* [1966] 3 All ER 353, [1967] 1 WLR 104; *Edwards v Society of Graphical and Allied Trades* [1971] Ch 354 at 365, [1970] 3 All ER 689 at 911-912, CA, per Buckley LJ. See also *Payzu Ltd v Saunders* [1919] 2 KB 581 at 588, CA, per Bankes LJ.

8 See *Edwards v Society of Graphical and Allied Trades* [1971] Ch 354 at 363-364, [1970] 1 All ER 905 at 911, CA, per Buckley J.

9 See *Yetton v Eastwoods Froy Ltd* [1966] 3 All ER 353 at 366, [1967] 1 WLR 104 at 119 per Blair J.

10 The plaintiff need not consider any offer of alternative employment until the defendant has committed a breach of contract by dismissing him: *Shindler v Northern Raincoat Co Ltd* [1960] 2 All ER 239 at 249, [1960] 1 WLR 1038 at 1048 per Diplock J. See further EMPLOYMENT vol 40 (2009) PARA 786.

11 *Yetton v Eastwoods Froy Ltd* [1966] 3 All ER 353, [1967] 1 WLR 104 (dismissed managing director was justified in refusing an offer of employment as assistant managing director, the manner of dismissal also being taken into account); *Shindler v Northern Raincoat Co Ltd* [1960] 2 All ER 239, [1960] 1 WLR 1038 (dismissed managing director). See also *Ross v Pender* 1874 1 R 352, Ct of Sess (head gamekeeper not bound to accept employment at the same wages in a subordinate position); *Clayton-Greene v de Courville* (1920) 36 TLR 790 (dismissed actor justified in refusing minor part in a play at the same salary); cf *Brace v Calder* [1895] 2 QB 253, CA (technical dismissal of an employee on the dissolution of a partnership but the continuing partners were willing to retain his services, and nominal damages were awarded). See also *Barnes v Port of London Authority* [1957] 1 Lloyd's Rep 486 (employee injured by his employer's negligence unreasonably refused an offer of suitable work).

12 As to damages for personal injury see PARA 878 et seq ante.

13 *Marcroft v Scruttons Ltd* [1954] 1 Lloyd's Rep 395, CA (refusal to undergo recommended medical treatment); *McAuley v London Transport Executive* [1957] 2 Lloyd's Rep 500, CA (refusal to undergo operation for suture of severed nerve). The onus of proving that the refusal is unreasonable is on the defendant: *Steele v Robert George & Co (1937) Ltd* [1942] AC 497, [1942] 1 All ER 447, HL; *Morgan v T Wallis Ltd* [1974] 1 Lloyd's Rep 165. See also *Richardson v Redpath Brown & Co Ltd* [1944] AC 62, [1944] 1 All ER 110, HL. A plaintiff in an action for damages who rejects a medical recommendation in favour of surgery must, in order to prove that he acted reasonably in relation to his duty to mitigate his damage, show that he acted reasonably in all the circumstances of the case: *Selvanayagam v University of West Indies* [1983] 1 All ER 824, [1983] 1 WLR 585, PC. The Supreme Court of Victoria did not follow this case in *Metal Fabrications (Victoria) Pty Ltd v Kelcey* [1986] VR 507.

14 *Savage v T Wallis Ltd* [1966] 1 Lloyd's Rep 357, [1966] 116 NLJ 837, CA (conflict of medical opinion).

15 *James v Woodall Duckham Construction Co Ltd* [1969] 2 All ER 794, [1969] 1 WLR 903, CA; *Lines v Harland and Wolff Ltd* [1966] 2 Lloyd's Rep 400.

16 *Darbishire v Warran* [1963] 3 All ER 310, [1963] 1 WLR 1067, CA (motor car worth £85, repaired at a cost of £192). It may be reasonable to replace the damaged property by new property even if this may involve delay for which the defendant will have to pay: *Moore v DER Ltd* [1971] 3 All ER 517, [1971] 1 WLR 1476, CA. The measure of damages should not exceed the amount which the plaintiff reasonably needs to expend to make good his loss: *Sealace Shipping Co Ltd v Oceanvoice Ltd, The Alecos M* [1990] 1 Lloyd's Rep 82 (revsd [1991] 1 Lloyd's Rep 120, CA); *Channel Island Ferries Ltd v Cenargo Navigation Ltd* [1994] 2 Lloyd's Rep 161.

17 *O'Grady v Westminster Scaffolding Ltd* [1962] 2 Lloyd's Rep 238 (unique motor car); considered in *Darbishire v Warran* [1963] 3 All ER 310 at 313, [1963] 1 WLR 1067 at 1072, CA, per Harman LJ, at 317 and 1077 per Pearson LJ, and at 318 and 1079 per Pennycuik J.

## UPDATE

### 1043 Examples of mitigation

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 13--*Selvanayagam*, cited, not followed *Geest plc v Lansiquot* [2002] UKPC 48, [2002] 1 WLR 3111.

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#### **1044. Loss which the plaintiff has avoided.**

Where a plaintiff has taken more steps in mitigation than were required of him and has thereby reduced, or further reduced, his loss the defendant may take advantage of the reduction unless the steps in mitigation were completely collateral to the original wrong<sup>1</sup>. The defendant may take advantage of steps which are a reasonable and prudent course naturally arising out of the circumstances in which the plaintiff was placed by the defendant's wrong<sup>2</sup>, but not those which are *res inter alios acta* or collateral to the wrong. Thus account may be taken of transactions which form part of a continuous dealing with the situation in which the plaintiff finds himself, but not independent or disconnected transactions<sup>3</sup>. If a transaction of which account may be taken produces a gain to the plaintiff that gain may be set against the initial loss<sup>4</sup>. It is a question of fact whether a benefit accruing to a plaintiff relates sufficiently closely to a head of damage for it to be appropriate to set off that benefit<sup>5</sup>. The burden of proving that the plaintiff's loss has been diminished or avoided lies on the defendant<sup>6</sup>.

Steps which a plaintiff has taken before the commission of the defendant's wrong and which have the effect of reducing the plaintiff's loss will generally be collateral matters and irrelevant to the assessment of damages. Thus no account will be taken of insurance money<sup>7</sup> received by the plaintiff, and sub-contracts made by the plaintiff will generally be irrelevant<sup>8</sup>.

1 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd* [1912] AC 673, HL (profit from superior turbines which had been purchased to replace deficient turbines supplied by the defendants should be brought into account); *Staniforth v Lyall* (1830) 7 Bing 169; *Erie County Natural Gas and Fuel Co Ltd v Carroll* [1911] AC 105, PC. See also *Hussey v Eels* [1990] 2 QB 227, [1990] 1 All ER 449, CA; *Gardner v Marsh & Parsons* [1997] 3 All ER 871 at 885, [1997] 1 WLR 489 at 503, CA, per Hirst LJ (repairs which resulted in the avoidance of a large part of the plaintiff's loss were not part of a continuous course of dealing flowing from the original transaction). See also *Hodge v Clifford Cowling & Co* (1990) 46 EG 120, [1990] 2 EGLR 89, CA (plaintiff's mitigation of loss by acquisition of a supermarket was purely fortuitous and not connected with the defendant's breach of duty; accordingly it was not a matter to be taken into account in diminution of damage); *Famosa Shipping Co Ltd v Armada Bulk Carriers Ltd* [1994] 1 Lloyd's Rep 633.

2 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd* [1912] AC 673 at 691, HL, per Viscount Haldane LC.

3 *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd* [1912] AC 673 at 692, HL, per Viscount Haldane LC; *Pagnan and Fratelli v Corbisa Industrial Agropacuaria Ltda* [1971] 1 All ER 165, [1970] 1 WLR 1306, CA (buyers rejected damaged goods and then repurchased the goods from the sellers at a reduced price); cf *Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175, PC; *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep 65, Times, 10 February, CA; *Jebsen v East and West India Dock Co* (1875) LR 10 CP 300.

4 *The World Beauty* [1970] P 144, [1969] 3 All ER 158, CA (on loss arising because a tanker was damaged during the currency of a charter, gains arising from the advancement of the commencement of a different pre-arranged charter had to be offset against that loss); *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rlys Co of London Ltd* [1912] AC 673 at 691, HL, per Viscount Haldane LC. See also *Bellingham v Dhillon* [1973] QB 304, [1973] 1 All ER 20; cf *Hussey v Eels* [1990] 2 QB 227, [1990] 1 All ER 449, CA. A plaintiff's temporary rental advantage resulting from her solicitors' negligent delay in negotiating a new tenancy could not be treated as a deduction from the plaintiff's original loss: *Teasdale v Williams & Co (a firm)* (1983) 269 EG 1040, CA.

5 *Nadreph v Willmet & Co* [1978] 1 All ER 746, [1978] 1 WLR 1537.

6 *The World Beauty* [1970] P 144, [1969] 3 All ER 158, CA.

7 *Bradburn v Great Western Rly Co* (1874) LR 10 Exch 1. See also *Parry v Cleaver* [1970] AC 1, [1969] 1 All ER 555, HL; *Smoker (Alexander) v London Fire and Civil Defence Authority* [1991] 2 AC 502, [1991] 2 All ER 449, HL; *Hopkins v Norcross plc* [1993] 1 All ER 565 (aff sub nom *Hopkins v Norcross plc* in [1994] ICR 11, [1994] IRLR 18, CA; *Longden v British Coal Corp*n [1998] 1 All ER 289, [1997] 3 WLR 1336, HL (pensions); *The Yasin* [1979] 2 Lloyd's Rep 45; *Europe Mortgage Co Ltd v Halifax Estate Agencies Ltd (t/a Colleys)* [1996] EGCS 84, (1996) Times, 23 May.

8 *Rodocanachi v Milburn* (1886) 18 QBD 67, CA; *Williams Bros v Ed T Agius Ltd* [1914] AC 510, HL; *Slater v Hoyle and Smith Ltd* [1920] 2 KB 11, CA; cf *Wertheim v Chicoutimi Pulp Co* [1911] AC 301, PC; *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA. See further PARA 1056 post; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 295-296, 314. See also *Haviland v Long* [1952] 2 QB 80, [1952] 1 All ER 463, CA (effect of covenant by new tenant to put premises in repair where old tenant was in breach of repairing covenant); cf *Performance Cars Ltd v Abraham* [1962] 1 QB 33, [1961] 3 All ER 413, CA; and see PARA 854 ante.

## UPDATE

### 1044 Loss which the plaintiff has avoided

NOTE 3--See also *Mobil North Sea Ltd v PJ Pipe & Valve Co (t/a PJ Valves or PJ Valve Ltd)* [2001] EWCA Civ 741, [2001] 2 All ER (Comm) 289 (settlement agreement between claimants an independent transaction).

NOTE 7--See also *Arab Bank plc v John D Wood Commercial Ltd* [2000] 1 WLR 857, CA.



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## (iv) Impecuniosity

### 1045. General rule.

Generally, in actions for breach of contract and tort<sup>1</sup>, a plaintiff cannot recover losses resulting from his impecuniosity<sup>2</sup>. This is rationalised on the basis that either the loss flowing from the plaintiff's impecuniosity, although concurrent with loss flowing from the breach of contract or tort, is independently caused or too remote<sup>3</sup>. There are decisions which treat this result not as a rule of law but rather as a matter of factual remoteness and have held that the loss accruing through impecuniosity was not too remote on the facts<sup>4</sup>. Other decisions have treated the result not as a rule of law but as a matter of factual causation allowing full recovery if impecuniosity was not the only reason for the accrual of the loss in question<sup>5</sup>. Most decisions, however, treat the impecuniosity issue as a matter of both remoteness and causation<sup>6</sup>. In some cases recovery has been allowed without any reference to the general rule<sup>7</sup>.

1 *Monarch Steamship Co Ltd v Karlshamns Oljefabriker AB* [1949] AC 196 at 224, [1949] 1 All ER 1 at 14, HL, per Lord Wright. As to damages in tort see PARA 851 et seq ante.

2 *Liesbosch Dredger v SS Edison* [1933] AC 449, HL. See also *Ramwade Ltd v WJ Emson & Co Ltd* [1987] RTR 72, 130 Sol Jo 804, CA.

3 'But the appellants' actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause ... the impecuniosity was not traceable to the respondents' acts, and in my opinion was outside the legal purview of the consequences of these acts ... In the present case if the appellants' financial embarrassment is to be regarded as a consequence of the respondents' tort, I think it is too remote, but I prefer to regard it as an independent tort': *Liesbosch Dredger v SS Edison* [1933] AC 449 at 460, HL, per Lord Wright. This result has been called into question in respect of its doctrinal correctness: see *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd, The Wagon Mound* [1961] AC 388 at 423-424, [1961] 1 All ER 404 at 414, PC; *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928 at 940, [1980] 1 WLR 433 at 458, CA, per Donaldson LJ; *Perry v Sidney Phillips & Son* [1982] 3 All ER 705 at 712, [1982] 1 WLR 1297 at 1307, CA, per Kerr LJ. In *Monarch Steamship Co Ltd v Karlshamns Oljefabriker AB* [1949] AC 196 at 223-224, [1949] 1 All ER 1 at 13-14, HL, Lord Wright himself appears to treat *Liesbosch Dredger v SS Edison* supra as a case concerning an issue of fact rather than the application of a rule of law. As to damages in tort see PARA 851 et seq ante.

4 See *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 at 302-303, [1952] 1 All ER 970 at 975, CA, per Somervell LJ, at 306 and 977 per Denning LJ, and at 307 and 978 per Romer LJ; *Muhammed Issa El Sheikh Ahmed v Al* [1947] AC 414, [1948] LJR 455, PC (factual causation is also noted by the Privy Council but only briefly and within a paragraph mainly concerned with remoteness); *Perry v Sidney Phillips & Son* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA; *Archer v Brown* [1985] QB 401, [1984] 2 All ER 267; *Wadsworth v Lydal* [1981] 2 All ER 401, [1981] 1 WLR 598, CA. See also *Cia Financiera Soleada SA v Hamoor Tanker Corpn Inc, The Borag* [1981] 1 All ER 856, [1981] 1 WLR 274, CA. See further *Monarch Steamship Co Ltd v Karlshamns Oljefabriker AB* [1949] AC 196 at 223-224, [1949] 1 All ER 1 at 14, HL, per Lord Wright.

5 *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433, CA. See further *Mattocks v Mann* [1993] RTR 13, (1992) Times, 19 June, CA.

6 See eg *Perry v Sidney Phillips & Son* [1982] 1 All ER 1005 at 1013 per Sir Patrick Bennett QC (overruled in part on another point [1982] 3 All ER 705, [1992] 1 WLR 1297, CA); citing a passage of Lord Denning MR in *Cia Financiera Soleada SA v Hamoor Tanker Corpn Inc, The Borag* [1981] 1 All ER 856 at 861, [1981] 1 WLR 274 at 281, CA, where Lord Denning MR suggested causation and remoteness were two different ways of stating the same question. In the Court of Appeal's judgment in *Perry v Sidney Phillips & Son* [1982] 3 All ER 705, [1992] 1 WLR 1297, CA, where Lord Denning was one member of the court, only the language of remoteness was used. See also *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928 at 940, [1980] 1 WLR 433 at 459, CA, per Donaldson LJ.

7 See *Bacon v Cooper (Metals) Ltd*[1982] 1 All ER 397.

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**1046. Impecuniosity preventing mitigation.**

The fact that a plaintiff's impecuniosity prevents him from mitigating his loss does not prevent him from claiming full damages. The defendant must take the plaintiff as he finds him and accept that damages may be aggravated by the plaintiff's inability to mitigate loss owing to that party's impecuniosity<sup>1</sup>.

<sup>1</sup> *Clippens Oil Co Ltd v Edinburgh and District Water Trustees* [1907] AC 291 at 303, HL, per Lord Collins. See also *Liesbosch Dredger v SS Edison* [1933] AC 449 at 461, HL, per Lord Wright; *Robbins of Putney Ltd v Meek* [1971] RTR 345; *Martindale v Duncan* [1973] 2 All ER 355, [1973] 1 WLR 574, CA; *Bunclark v Hertfordshire County Council* (1977) 234 EG 381, 455; *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433, CA; *Cia Financiera Soleada SA v Hamoor Tanker Corpn Inc, The Borag* [1981] 1 All ER 856, [1981] 1 WLR 274, CA; *Perry v Sidney Phillips & Son* [1982] 1 All ER 1005 (on appeal [1982] 1 All ER 1005, [1982] 1 WLR 1297, CA); *Mattocks v Mann* [1993] RTR 13, (1992) Times, 19 June, CA. As to mitigation see PARAS 1041-1044 ante.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(2) LIMITING OR CONSTRAINING FACTORS IN THE RECOVERY OF DAMAGES FOR BREACH OF CONTRACT/(v) Contributory Negligence/1047. Where defence available.

## **(v) Contributory Negligence**

### **1047. Where defence available.**

The defence of contributory negligence<sup>1</sup> is available in a limited class of actions for breach of contract. It applies only where the acts or omissions of the defendant which constitute the breach of contract could also have given rise, independently of the contract, to a liability in tort<sup>2</sup>. For the defence to apply, the defendant's liability for breach of contract must coincide and be co-extensive with a liability in tort, which liability in tort arises independently of the existence of the contract and is itself normally susceptible to the defence<sup>3</sup>. Those requirements are met where a defendant's breach of his contractual duty of reasonable care simultaneously involves commission of the tort of negligence towards the plaintiff<sup>4</sup>. In that event, it does not matter that the defendant's potential liability in tort is not sued upon or that the plaintiff's action is brought solely in contract<sup>5</sup>. The court will not allow the plaintiff to avoid the defence by framing the action alternatively in contract, when the acts or omissions of the defendant could equally have given rise to a liability in tort attracting the defence<sup>6</sup>.

1 See the Law Reform (Contributory Negligence) Act 1945; and PARAS 1048-1050 post. As to contributory negligence generally see further NEGLIGENCE vol 78 (2010) PARA 75 et seq.

2 *Barclays Bank plc v Fairclough Building Ltd*[1995] QB 214, [1995] 1 All ER 289, CA; *Forsikringsaktieselskapet Vesta v Butcher*[1989] AC 852, [1989] 1 All ER 402, HL.

3 *Barclays Bank plc v Fairclough Building Ltd*[1995] QB 214 at 228-229, [1995] 1 All ER 289 at 301, CA, per Beldam LJ.

4 *Barclays Bank plc v Fairclough Building Ltd*[1995] QB 214 at 229, [1995] 1 All ER 289 at 301, CA, per Beldam LJ; *Forsikringsaktieselskapet Vesta v Butcher*[1989] AC 852, [1989] 1 All ER 402, HL. In many cases no such co-extensive liability in tort for negligence will exist because of the purely economic nature of the plaintiff's loss: see *Barclays Bank plc v Fairclough Building Ltd* supra. In principle, a defendant may invoke the defence of contributory negligence by showing that his breach of a strict liability term of the contract simultaneously involved the commission of a strict liability tort against the plaintiff, but this form of the defence would encounter two objections: (1) that torts of strict liability do not of themselves ordinarily attract the defence (see eg *Alliance and Leicester Building Society v Edgestop Ltd*[1994] 2 All ER 38, [1993] 1 WLR 1462 (deceit)); and (2) that such a result may be excluded by the true construction of the contract which imposed the strict liability, for the 'very imposition of a strict liability upon the defendant is ... inconsistent with an apportionment of the loss': *Barclays Bank plc v Fairclough Building Ltd* supra at 233 and 306 per Simon Brown LJ, and at 230 and 302 per Beldam LJ.

5 *Barclays Bank plc v Fairclough Building Ltd*[1995] QB 214, [1995] 1 All ER 289, CA.

6 *Barclays Bank plc v Fairclough Building Ltd*[1995] QB 214 at 228, [1995] 1 All ER 289 at 301, CA, per Beldam LJ.

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#### **1048. Where defence unavailable.**

Consistently with the foregoing principles, the defence of contributory negligence is not available where the defendant's acts or omissions were not actionable as an independent tort<sup>1</sup>. Cases where the defence is unavailable fall into two main categories: (1) those where the liability of the defendant arises from a breach of a contractual provision which does not depend on a failure to take reasonable care; and (2) those where the liability of the defendant arises from a breach of an express contractual obligation to take care, but that obligation does not correspond to any duty in tort which would exist independently of the contract<sup>2</sup>. The defence does not apply to a claim under a deed of indemnity where no duty of care was owed<sup>3</sup>, or to an action for breach of a contractual duty to provide workmanship which is the best of its kind, for a term of that kind imposes a stricter duty than one of reasonable care<sup>4</sup>. The defence may also be unavailable to an action for breach of the implied warranty that an artificer possesses the degree of skill and expertise appropriate to his calling<sup>5</sup>.

1 *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, [1988] 2 All ER 43, CA; *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214, [1995] 1 All ER 289, CA; and see PARA 1047 ante. As to damages in tort see PARA 851 et seq ante.

2 *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214, [1995] 1 All ER 289, CA; *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, [1988] 2 All ER 43, CA.

3 *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852 at 865, [1988] 2 All ER 43 at 51, CA, per O'Connor LJ; approving *Basildon District Council v JE Lesser Properties Ltd* [1985] QB 839, [1985] 1 All ER 20.

4 *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214, [1995] 1 All ER 289, CA, which further held the defence unavailable to an action for breach of a contractual undertaking that the defendant would comply with the Control of Asbestos at Work Regulations 1987, SI 1987/2115.

5 *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214 at 229, [1995] 1 All ER 289 at 300, CA, per Beldam LJ (point left open).

#### **UPDATE**

#### **1048 Where defence unavailable**

NOTE 4--SI 1987/2115 replaced by the Control of Asbestos Regulations 2006, SI 2006/2739 (amended by SI 2008/2852).

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**1049. Existence, nature and scope of plaintiff's responsibility.**

The nature of the contract is relevant in determining both the existence and scope of the plaintiff's responsibility to take care to guard against the relevant risk<sup>1</sup>. Failure to take such care does not necessarily involve the breach of any actionable duty of care owed by the plaintiff<sup>2</sup>. For the defence to apply, the risk itself must have been foreseeable and the conduct of the plaintiff must have been unreasonable in all the circumstances<sup>3</sup>. Where a plaintiff engages a reputable contractor to perform a contractual task, such engagement will by itself normally mean that the plaintiff has acted with the necessary prudence in regard to his interests. The plaintiff's damages will not, therefore, normally be reduced on grounds of the plaintiff's failure to supervise the contractor, or to guard against the contractor's failure to discharge his obligations, for experience will normally have shown that a reputable contractor is unlikely to need such monitoring or break his obligations. Courts recognise the importance of being able to rely on professional contractors to do their job<sup>4</sup>.

1 *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214, [1995] 1 All ER 289, CA.

2 *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214, [1995] 1 All ER 289, CA. See also PARA 1047 ante.

3 *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214 at 228, [1995] 1 All ER 289 at 301, CA, per Beldam LJ.

4 *Cia Naviera Maropan S/A v Bowmakers Lloyd Pulp & Paper Mills Ltd* [1955] 2 QB 68, [1955] 2 All ER 241, CA; *Reardon Smith Line Ltd v Australian Wheat Board* [1956] AC 266, [1956] 1 All ER 456, PC (cited in *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214 at 229, [1995] 1 All ER 289 at 302, CA, per Beldam LJ). See also *EH Cardy & Son Ltd v Taylor* (1994) 38 ConLR 79.

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### **1050. Interrelation with other limiting factors.**

On particular facts, the defence of contributory negligence may be available alongside that of failure to mitigate<sup>1</sup> or want of causation<sup>2</sup>, or the plaintiff may have broken some counter-obligation to the defendant, the breach of which may enable the defendant to recover the whole or part of any amount otherwise payable to the plaintiff on the principal claim<sup>3</sup>. Where a defendant is sued in tort and counterclaims for breach of contract, alleging that the plaintiff's loss was caused in part by the plaintiff's breach of a strict contractual duty owed to the defendant, the necessary apportionment of damages will be made by quantifying the respective causal impact of each party's wrong on the overall loss, and not by reference to the defence of contributory negligence<sup>4</sup>.

1 As to mitigation see PARA 1041 ante.

2 As to causation see PARA 1035 ante.

3 *Tennant Radiant Heat Ltd v Warrington Development Corpn* (1988) 11 EG 71, [1988] 1 EGLR 41, CA.

4 *Tennant Radiant Heat Ltd v Warrington Development Corpn* (1988) 11 EG 71, [1988] 1 EGLR 41, CA; approved in *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214, [1995] 1 All ER 289, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(3) CONTRACT: PARTICULAR TRANSACTIONS/1051. Agency.

### **(3) CONTRACT: PARTICULAR TRANSACTIONS**

#### **1051. Agency.**

Subject to contrary stipulation, an agent impliedly undertakes to his principal that he will execute his mandate with reasonable care and skill<sup>1</sup>. The scope of the duty is substantially the same in contract and in tort<sup>2</sup>. Damages for breach are assessed on common law principles appropriate to the cause of action<sup>3</sup>. According to circumstance, and subject to the ordinary constraints<sup>4</sup>, the damages recoverable in contract may be the cost to the principal of obtaining substituted performance of the task which the agent should have performed<sup>5</sup>, or the profit which the principal failed to gain through the agent's non-performance<sup>6</sup>. In those rare cases where an agent is personally liable on, or personally entitled to enforce, a contract which he negotiates for his principal, the measure of damages is that peculiar to the particular contract<sup>7</sup>. Most agents owe fiduciary obligations to their principals and may incur restitutionary obligations of a personal or proprietary nature<sup>8</sup>.

1 See AGENCY vol 1 (2008) PARA 78 et seq. See also the Supply of Goods and Services Act s 13 (services supplied in the course of business).

2 See AGENCY vol 1 (2008) PARAS 78-80. Cf *Smith v Eric S Bush*, *Harris v Wyre Forest District Council*[1990] 1 AC 831 at 844, [1989] 2 All ER 514 at 520, HL, per Lord Templeman; *South Australia Asset Management Corp v York Montague Ltd*[1997] 1 AC 191 at 211, [1996] 3 All ER 365 at 370, HL, per Lord Hoffmann (surveyors and valuers: see PARA 1058 post). As to damages awardable to an agent, where the principal who had repudiated the contract of agency had not exercised its contractual right to terminate, see *Connaught Properties Ltd v Regional Properties Ltd*[1942] 2 KB 314; cf para 956 ante. As to damages in tort see PARA 851 et seq ante. As to repudiation of a contract see CONTRACT vol 9(1) (Reissue) PARA 997 et seq.

3 As to damages in contract generally see PARA 941 et seq ante. As to damages in tort see PARA 851 et seq ante.

4 For example, remoteness of damage (see PARA 1015 et seq ante), causation (see PARA 1035 et seq ante), mitigation (see PARA 1041 et seq ante) and contributory negligence (see PARA 1047 et seq ante).

5 This is likely to be the case where the agent was engaged to acquire property for personal use on the principal's behalf: see AGENCY vol 1 (2008) PARA 86.

6 This is likely to be the case where the agent was engaged to acquire property for resale, or to sell property, on the principal's behalf: see AGENCY vol 1 (2008) PARA 86.

7 Eg sale of goods: see PARA 1056 post; and SALE OF GOODS AND SUPPLY OF SERVICES. Cf *Farley Health Products Ltd v Babylon Trading Co* (1987) Times, 29 July. As to breach of warranty of authority see PARA 1052 post.

8 See AGENCY vol 1 (2008) PARA 87.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(3) CONTRACT: PARTICULAR TRANSACTIONS/1052. Warranty of authority.

### 1052. Warranty of authority.

In an action against an agent for breach of warranty of authority<sup>1</sup>, the measure of damages may depend on the nature of the obligation<sup>2</sup>. Actions for breach of warranty of authority have been variously classed as actions in contract<sup>3</sup>, in quasi-contract<sup>4</sup> and in tort<sup>5</sup>. The contractual analysis probably commands greatest support from older authority<sup>6</sup>, not least because liability under the warranty is strict<sup>7</sup>. However, recent authority regards the liability of the agent as sui generis, distinct from both contract and tort, and much closer to the liability imposed by statute for non-fraudulent misrepresentation<sup>8</sup>, and to the types of claim allowed in cases of reliance loss<sup>9</sup> in contract<sup>10</sup>. In general terms, the measure of damages is the loss actually sustained by the claimant as the natural and probable consequence of the non-existence of the authority warranted, or such loss as both parties might reasonably expect as a probable consequence of the breach of warranty<sup>11</sup>. This may cover wasted litigation costs which the claimant, relying on the truth of the warranty, has reasonably<sup>12</sup> incurred in suing, or defending against, the supposed principal<sup>13</sup>; or sums reflecting the profit which the claimant would have gained from the supposed contract with the principal, had the principal not disavowed it for want of authority<sup>14</sup>. However, the warrantor is not to be treated as a contracting principal, so as render him necessarily liable, for example, for the full price of goods ordered by him without authority<sup>15</sup>.

1 As to warranty of authority see AGENCY vol 1 (2008) PARA 160 et seq.

2 As to the measure of damages in contract see PARA 941 et seq ante. As to the measure of damages in tort see PARA 851 et seq ante.

3 *Dickson v Reuter's Telegram Co Ltd* (1877) 3 CPD 1 at 5, CA, per Bramwell LJ; *Yonge v Toynbee* [1910] 1 KB 215 at 228, CA, per Buckley LJ; *Allan & Anderson Ltd v AH Basse Rederi A/S, The Piraeus* [1974] 2 Lloyd's Rep 266, CA; and see *Bowstead and Reynolds on Agency* (16th Edn, 1996) PARA 9-058. Cf *V/O Rasnoimport v Guthrie & Co Ltd* [1966] 1 Lloyd's Rep 1 at 12-13 per Mocatta J.

4 *Lomax v Dankel* [1981] 29 SASR 68, SA SC; following *Collen v Wright* (1857) 8 E & B 647.

5 See *Hawke's Bay Milk Corp Ltd v Watson* [1974] 1 NZLR 236; cf *Collen v Wright* (1857) 8 E & B 647. See further cases on gratuitous bailment which analyse the cases as cases in tort: *AS James Pty Ltd v CB Duncan* [1970] VR 705; *Southland Harbour Board v Vella* [1974] 1 NZLR 526; *Walker v Watson* [1974] 2 NZLR 175. As to damages in tort generally see PARA 851 et seq ante.

6 See the authorities cited in note 3 supra. See also *Bowstead and Reynolds on Agency* (16th Edn, 1996) PARAS 9-058, 9-059.

7 *Yonge v Toynbee* [1910] 1 KB 215, CA. Where the agent's statement as to his authority is fraudulent, an action in tort for deceit will lie against him. Where the agent's statement as to his authority is negligent, an action may also lie in tort. As to an agent's liability under the Misrepresentation Act 1967 see *Resolute Maritime Inc v Nippon Kaiji Kyokai, The Skopas* [1983] 2 All ER 1, [1983] 1 WLR 857. As to damages in misrepresentation see PARA 1109 et seq post; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 805 et seq.

8 *Farley Health Products Ltd v Babylon Trading Co* (1987) Times, 29 July per Lawson J; cf *Resolute Maritime Inc v Nippon Kaiji Kyokai, The Skopas* [1983] 2 All ER 1, [1983] 1 WLR 857.

9 *Anglia Television Ltd v Reid* [1971] 1 QB 60, [1971] 3 All ER 690, CA; *CCC Films Ltd v Impact Quadrant Films Ltd* [1985] QB 16, [1984] 3 All ER 298. As to reliance loss see PARAS 943-945, 987 et seq ante.

10 'If this is right, then to apply the distinct contract or tort principles to measure the damages in breach of warranty cases is difficult to justify. I am confident that the right measure is the loss caused which can also be described as expenditure wasted as the result of an untrue representation': *Farley Health Products Ltd v*

*Babylon Trading Co* (1987) Times, 29 July, per Lawson J (agent ordering goods on behalf of principal who had ceased to exist some three and a half years earlier; damages awarded against agent to represent expenditure wasted in the manufacturing, packing and shipping of goods not paid for, and costs thrown away in claiming against the non-existent principal). As to the recovery of the costs of pursuing or defending proceedings involving third parties, where those costs are incurred by reason of a breach of obligation see generally para 826 et seq ante.

11 *Farley Health Products Ltd v Babylon Trading Co* (1987) Times, 29 July.

12 Cf *Pow v Davis* (1861) 1 B & S 220.

13 *D'Almeida Araujo Lda v Becker & Co Ltd* [1953] 2 QB 329, [1953] 2 All ER 288; *Farley Health Products Ltd v Babylon Trading Co* (1987) Times, 29 July. Where the want of authority has become clear at a time when the contract is wholly executory, such costs may be the only natural and probable consequence of the breach of warranty: *Farley Health Products Ltd v Babylon Trading Co* supra. It is otherwise when the claimant, relying on the warranty, has acted to his detriment: *Farley Health Products Ltd v Babylon Trading Co* supra.

14 See eg *Simons v Patchett* (1857) 7 E & B 568 (sale of ship); *Godwin v Francis* (1870) LR 5 CP 295 (sale of land); *Richardson v Williamson and Lawson* (1871) LR 6 QB 276 at 279 per Blackburn J; *Heskell v Continental Express* [1950] 1 All ER 1033, *Farley Health Products Ltd v Babylon Trading Co* (1987) Times, 29 July. But such damages may not be recoverable where the supposed contract is not wholly unperformed (*Farley Products Ltd v Babylon Trading Co* supra), or would in any event have been unenforceable (*Warr v Jones* (1876) 24 WR 695; *Heskell v Continental Express* [1950] 1 All ER 1033; *Farley Health Products Ltd v Babylon Trading Co* supra), or where the supposed principal was insolvent (*Farley Health Products Ltd v Babylon Trading Co* supra, which endorses the 'natural and probable consequence principle'). See also *Wickberg v Shatsky* (1969) 4 DLR (3d) 540, BC SC. Cf *Chitholie v Nash & Co* (1973) 229 EG 786.

15 *Farley Health Products Ltd v Babylon Trading Co* (1987) Times, 29 July.

## UPDATE

### 1052 Warranty of authority

NOTE 11--See *Nimmo v Habton Farms* [2003] EWCA Civ 68, [2003] 1 All ER 1136, [2003] 2 All ER (Comm) 109.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(3) CONTRACT: PARTICULAR TRANSACTIONS/1053. Assignment.

### 1053. Assignment.

Assignment of the right to demand performance of a contract<sup>1</sup> does not, by itself, change the substance of the obligation to be performed by the obligor, or the identity of the party from whom the obligor takes instructions<sup>2</sup>. Nor does it increase the damages which the obligor must pay for non-performance; the assignee can recover only what the assignor could have recovered<sup>3</sup>. An assignor who suffers no substantial loss cannot therefore, merely by assigning the benefit of the contract, confer a right to substantial damages on the assignee, even where the contract was expressed to be for the benefit of the assignee<sup>4</sup>. However, modern authority seems increasingly willing to discover substantial loss in circumstances where it appears to be distributed among third parties<sup>5</sup>. Where an employer assigns a building contract, a right to substantial damages may be discovered in him (and may therefore be assignable to the assignee) though the assignor neither owned the building at the time of breach nor bears the loss caused by misperformance<sup>6</sup>. Where an assignment fails because it is prohibited by the contract, the assignor may also be entitled to substantial damages, though the assignor neither owned the building at the time of breach nor bears the loss caused by misperformance<sup>7</sup>.

<sup>1</sup> See generally CONTRACT.

<sup>2</sup> 'A contract that A will build a house for B, and follow his instructions on such variations as the contract may allow, cannot be converted by assignment into an obligation to follow the instructions of C': *Bovis International Inc v Circle Ltd Partnership* (1995) 49 ConLR 12 at 22, CA, per Staughton LJ, citing with approval his own remark in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1992) 57 BLR 57 at 77, CA (on appeal [1994] 1 AC 85, [1993] 3 All ER 417, HL). Cf *Bovis International Inc v Circle Ltd Partnership* supra at 31 per Millett LJ. As to transmission of the burden of the contract to occur, the contractor's assent would be required by way of novation: see CONTRACT vol 9(1) (Reissue) PARA 1036 et seq.

<sup>3</sup> *Dawson v Great Northern and City Rly Co* [1905] 1 KB 260, CA; *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SLT 533; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* (1992) 57 BLR 57 at 80, CA, per Staughton LJ (on appeal [1994] 1 AC 85, [1993] 3 All ER 417, HL); *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 900, [1995] 1 WLR 68 at 72, CA, per Dillon LJ. See also *Bovis International Inc v Circle Ltd Partnership* (1995) 49 ConLR 12 at 22, CA, per Staughton LJ, who further held that (1) the parity rule should govern breaches occurring both before and after assignment, for in each case the assignor or assignee (as the case may be) should recover no more or less than the assignor's own loss; (2) in many cases, such as defective building, the recoverable cost will be the same whether the repairs are carried out for the assignor or the assignee; and (3) even if the parity rule were not generally applicable, it applied on the particular construction of the present assignment, the obvious aim of which, viewed in its contractual setting, was to allow the assignees to recover, by way of security, 'such monetary sums as might become due to the developers under the management contract'; a right which, on re-assignment had returned to the developers, the assignors. Cf *Bovis International Inc v Circle Ltd Partnership* supra at 31 per Millett LJ, who, while accepting as 'obvious' that an assignment cannot change the nature or extent of the assigned obligation, thought that an assignee might (subject to the rules on remoteness of damage: see PARA 1015 et seq ante) be entitled to damages in respect of 'all uncompensated loss which he or his assignor has sustained'. In *Bovis International Inc v Circle Ltd Partnership* supra at 31 Millett LJ admitted that this may amount to no more than a re-phrasing of the rule in *Dawson v Great Northern and City Rly Co* supra, but nevertheless considered the reformulation valuable, in that it brought out the distinction between heads of damage and measure of damages. This implies that, whereas an assignment cannot increase or alter the heads of damages for which the contract-breaker is answerable, it may make the contract-breaker liable for a greater measure of loss within the same head suffered by the assignee over the assignor. The point did not arise in *Bovis International Inc v Circle Ltd Partnership* supra because the assignment was merely by way of security and, even if it had not been, the assignee's loss would have been the same as the assignor's: see *Bovis International Inc v Circle Ltd Partnership* supra at 31 per Millett LJ, who observed that the loss incurred through the late receipt of money on late completion of a development project 'is independent of the identity of the person entitled to receive it'.

4 *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 900, [1995] 1 WLR 68 at 72, CA, per Dillon LJ.

5 As to the availability of claims against third parties see generally para 826 ante.

6 *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA; *Bovis International Inc v Circle Ltd Partnership* (1995) 49 ConLR 12, CA (developers who assign by way of mortgage their interest in a management contract, and to whom the contract is later re-assigned on payment of the debt, can recover substantial damages for loss caused by breach of the management contract during the period of the assignment, though the assignment was absolute rather than by way of charge, and though the loss caused by the breaches has been or will be made good to the developers by a third party; the fact that a development is agreed to be on a 'cost-plus basis' between the developers and the beneficial owners does not, therefore, prevent the developers from recovering substantial damages from management contractors whose breach of contract with the developers delays the project).

7 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL; cf *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA (no assignment by employer; building owned throughout, and loss suffered, by sister company of employer; employer could nevertheless recover substantial damages, to be held for sister company). As to building contracts see further PARA 1054 post.

## **UPDATE**

### **1053 Assignment**

NOTE 7--*Alfred McAlpine*, cited, reversed: [2000] 4 All ER 97, HL (employer not entitled to recover substantial damages because true loss sufferer had direct remedy against contractor).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(3) CONTRACT: PARTICULAR TRANSACTIONS/1054. Building contracts.

### 1054. Building contracts.

Subject to the normal constraints<sup>1</sup>, the ordinary<sup>2</sup> or prima facie<sup>3</sup> measure of damages for breach of a building contract<sup>4</sup>, or a contract to repair a building, is the cost of reinstatement or cure<sup>5</sup>. The builder or repairer must pay the cost of remedying the defect caused by breach<sup>6</sup>. That measure will often coincide with the diminution in value caused by the breach<sup>7</sup>. It is certainly the applicable measure where the cost of cure is less than any relevant diminution in value, and it may also be the applicable measure where there is no diminution<sup>8</sup>. In the absence of some special factor warranting a departure from the normal measure, the degree to which the works<sup>9</sup> have diminished in value by reason of the breach is irrelevant, and the builder or repairer cannot ordinarily rely on diminution as the proper measure, merely because this is lower than the cost of reinstatement<sup>10</sup>. However, the normal measure is not universal<sup>11</sup>. It is subordinate to an overriding requirement that the remedial programme by reference to which damages are to be assessed must be a reasonable course to adopt in all the circumstances<sup>12</sup>. Where the cost of reinstatement is quite unreasonable<sup>13</sup> and out of all proportion to the benefit which could accrue from it<sup>14</sup> the cost of diminution of the works will be preferred as the applicable measure, even if nominal<sup>15</sup>; for it would be absurd to take refuge from nominal damages in an excessive award scaled according to cost of cure<sup>16</sup>. In building contracts as in other contracts<sup>17</sup>, the innocent party has no universal right to be placed in the same physical (as opposed to financial) position he would have occupied after performance<sup>18</sup>. The choice, however, does not lie starkly between reinstatement and diminution<sup>19</sup>. In cases of minimal diminution, where the works were designed for private use, injustice can be avoided by awarding a sum to represent loss of a pleasurable amenity<sup>20</sup>.

1 Such as remoteness of damage (see PARA 1015 et seq ante), causation (see PARA 1035 et seq ante), mitigation (see PARA 1041 et seq ante) and contributory negligence (see PARA 1047 et seq ante).

2 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 at 366, [1995] 3 All ER 268 at 282, HL, per Lord Lloyd of Berwick.

3 *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 906, [1995] 1 WLR 68 at 79, CA, per Steyn LJ; *East Ham Borough Council v Bernard Sunley & Sons Ltd* [1966] AC 406, [1965] 3 All ER 619, HL.

4 As to building contracts generally see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS.

5 See *Mertens v Home Freeholds Co* [1921] 2 KB 526, CA; *Hoenig v Isaacs* [1952] 2 All ER 176, [1952] 1 TLR 1360, CA; *East Ham Borough Council v Bernard Sunley & Sons Ltd* [1966] AC 406, [1965] 3 All ER 619, HL; *William Cory & Sons Ltd v Wingate Investments (London Colney) Ltd* (1978) 17 BLR 104, CA. *Radford v de Froberville* [1978] 1 All ER 33, [1977] 1 WLR 1262; *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA; *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA; *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL. Cf Coote 'Contract Damages: Ruxley and the Performance Interest' [1997] CLJ 537.

6 As to the date at which the cost of repair must be assessed see *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928 at 933, [1980] 1 WLR 433 at 450-451, CA, per Megaw LJ, cited in *Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246 at 252-253, CA, per Taylor LJ (the normal date is that of breach, but where a material difference exists between the cost of cure at the date of the wrong and the cost of cure at the date on which the repairs can (having regard to all the relevant circumstances) first reasonably be undertaken, the latter affords the time of assessment). As to whether the damages payable by negligent surveyors are based on diminution in value or cost of cure see *Perry v Sidney Phillips & Son* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA; *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 1421, CA. See generally Coote 'Contract Damages: Ruxley and the Performance Interest' [1997] CLJ 537. As to surveyors and valuers see PARA 1058 post; BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS.

7 'The measure of damages for defective performance of a building contract is the diminution in value of the plaintiff's property, which diminution is usually properly reflected by the cost of carrying out the repairs necessary to effect reinstatement: *East Ham Borough Council v Bernard Sunley & Sons Ltd* [1966] AC 406, [1965] 3 All ER 619, HL'; see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 110, [1993] 3 All ER 417 at 433, HL, per Lord Browne-Wilkinson.

8 *Ruxley Electronics and Construction v Forsyth* [1996] AC 344 at 366, [1995] 3 All ER 268 at 282, HL, per Lord Lloyd of Berwick, who further remarked (while leaving the question open) that reinstatement may be the appropriate measure where the building commissioned by the employer is an eccentric folly and performance would actually diminish the value of the land.

9 In cases where diminution in value does become the relevant measure, it is the diminution in the value of the works, and not (where different) the diminution in the value of the freehold of the site, which counts as the appropriate measure: *Ruxley Electronics and Construction v Forsyth* [1996] AC 344 at 371, [1995] 3 All ER 268 at 287, HL, per Lord Lloyd of Berwick.

10 *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 906, [1995] 1 WLR 68 at 79, CA, per Steyn LJ.

11 *Jacobs and Youngs Inc v Kent* 129 NE 889 (1921); approved in *Ruxley Electronics and Construction v Forsyth* [1996] AC 344 at 366-367, [1995] 3 All ER 268 at 282-283, HL per Lord Lloyd of Berwick.

12 *Ruxley Electronics and Construction v Forsyth* [1996] AC 344 at 369-370, [1995] 3 All ER 268 at 285-286, HL, per Lord Lloyd of Berwick; *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 906, [1995] 1 WLR 68 at 79, CA, per Steyn LJ; *East Ham Borough Council v Bernard Sunley & Sons Ltd* [1966] AC 406, [1965] 3 All ER 619, HL; *GW Atkins Ltd v Scott* (1980) 46 ConLR 14, CA; *Bellgrove v Eldridge* (1954) 90 CLR 613. See also *Sealace Shipping Co v Oceanvoice, The Alecos M* [1991] 1 Lloyd's Rep 120, (1990) Times 25 September, CA (sale of ship without spare propeller).

13 Whether the innocent party intends to apply the damages awarded towards the fulfilment of the remedial programme by reference to which they are assessed is a relevant but not decisive factor in adjudging whether it would be reasonable to incur the cost of that programme in all the circumstances: *Ruxley Electronics and Construction v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL, especially at 372-373 and 287-288 per Lord Lloyd of Berwick; *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 907-908, [1995] 1 WLR 68 at 80, CA, per Steyn LJ; *Dean v Ainley* [1987] 3 All ER 748, [1987] 1 WLR 1729, CA; cf *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 97, [1993] 3 All ER 417 at 422, HL, per Lord Griffiths.

14 *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 906, [1995] 1 WLR 68 at 79, CA, per Steyn LJ; approved in *Ruxley Electronics and Construction v Forsyth* [1996] AC 344 at 369, [1995] 3 All ER 268 at 285, HL, per Lord Lloyd of Berwick.

15 See *Ruxley Electronics and Construction v Forsyth* [1996] AC 344 at 367, [1995] 3 All ER 268 at 283, HL, per Lord Lloyd of Berwick: the fact that the diminution in value is nil cannot make an alternative unreasonable measure of damages reasonable. Claims to recover the cost of unreasonable remedial programmes other than reinstatement may fail on similar grounds, eg moving to other residential premises with conforming facilities when a pleasurable facility such as a swimming pool, constructed on the innocent party's site, fails to comply with exact specifications, but when no rational person would adopt that course for that reason.

16 *Ruxley Electronics and Construction v Forsyth* [1996] AC 344 at 360-361, [1995] 3 All ER 268 at 277-278, HL per Lord Mustill.

17 See eg *Sealace Shipping Co Ltd v Oceanvoice Ltd, The Alecos M* (1991) 1 Lloyd's Rep 120, CA (sale of ship); approved in *Ruxley Electronics and Construction v Forsyth* [1996] AC 344 at 371, [1995] 3 All ER 268 at 287, HL, per Lord Lloyd of Berwick.

18 *Ruxley Electronics and Construction v Forsyth* [1996] AC 344 at 367, [1995] 3 All ER 268 at 283, HL, per Lord Lloyd of Berwick.

19 *Ruxley Electronics and Construction v Forsyth* [1996] AC 344 at 371, [1995] 3 All ER 268 at 287, HL, per Lord Mustill.

20 *Ruxley Electronics and Construction v Forsyth* [1996] AC 344 at 374, [1995] 3 All ER 268 at 290, HL, per Lord Lloyd of Berwick, and at 360-361 and 277-278 per Lord Mustill (swimming pool; House of Lords upheld award by trial judge, Judge Diamond QC, of £2500 for loss of pleasurable amenity and £750 for discomfort and inconvenience).

## UPDATE

## **1054 Building contracts**

NOTES--See *Bella Casa Ltd v Vinestone Ltd* [2005] EWHC 2807 (TCC), (2005) 108 ConLR 148 (damages for loss of use in relation to building contract); and *London Fire and Emergency Planning Authority v Halcrow Gilbert Associates Ltd* [2007] EWHC 2546 (TCC), [2007] All ER (D) 111 (Dec) (damages for negligent review of building design).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(3) CONTRACT: PARTICULAR TRANSACTIONS/1055. Carriers of goods.

### 1055. Carriers of goods.

Carriers of goods<sup>1</sup> are bailees<sup>2</sup> and actions against bailees can be brought in contract, tort or bailment<sup>3</sup>. The measure of damages is that appropriate to the particular cause of action<sup>4</sup>. In certain limited events, the measure may include an element of extra-compensatory damages<sup>5</sup>, which may (according to circumstances) be awarded in contract<sup>6</sup>, tort<sup>7</sup> or bailment<sup>8</sup>. Where a consignor of goods sues for loss of profit resulting from delay in transit, the action normally lies in contract if at all<sup>9</sup>. In that event, the normal principles of contractual damages apply<sup>10</sup>. On a falling market, the conventional measure payable by carriers who delay in delivery is the drop in market values: that is to say the value at the date of due delivery less the value at the date of actual delivery<sup>11</sup>. Whether lucrative onward contracts, already concluded by the consignor and yielding prices higher than normal market values, can be taken into account depends on normal principles of remoteness of damage<sup>12</sup>. In the absence of special communication, the carrier is not liable for those types or manifestations of loss<sup>13</sup> resulting from breach<sup>14</sup> which fall beyond those which the parties contemplated (or should have contemplated) as the natural and probable result of the breach<sup>15</sup>. It appears generally accepted that carriers of goods are likely to possess, in the ordinary course of events, less detailed knowledge as to specific onward contracts or markets than sellers<sup>16</sup>. Actions against carriers for loss of profits on particular contingent contracts rarely succeed without special communication<sup>17</sup>.

1 As to carriers generally see CARRIAGE AND CARRIERS. The carriage of goods by sea (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 205 et seq), by air (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 121 et seq) and by international carriers by road and rail (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 650 et seq) is governed by special statutory regimes. The liability of common carriers is also partly regulated by statute: see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 1, 27-37. Most contracts of carriage are transacted on special terms of business: see CONTRACT vol 9(1) (Reissue) PARA 756. This volume deals with the position of the carrier at common law without statutory or contractual modification.

2 See CARRIAGE AND CARRIERS vol 7 (2008) PARAS 59, 756. As to bailment see generally BAILMENT.

3 See CARRIAGE AND CARRIERS vol 7 (2008) PARA 765. As to the measure of damages in bailment see PARA 1088 et seq post.

4 As to damages in bailment see PARAS 1088 et seq post. A carrier or bailee may (subject to the ordinary principles of causation (see PARA 1035 et seq ante) and remoteness (see PARA 1015 et seq ante)) be answerable at common law to a consignor, consignee or other bailor for customs duties, taxes or other levies or imposts incurred by reason of the carrier's or other bailee's fault: *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141 at 158, [1977] 3 All ER 1048 at 1057 per Viscount Dilhorne and at 161, and 1060 obiter per Lord Salmon (the actual decision was that the carriers were liable for the disputed duty charges under the Carriage of Goods by Road Act 1965: see CARRIAGE AND CARRIERS vol 7 (2008) PARA 673); *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128 at 138, [1988] 1 FTLR 54 at 64, CA, per Slade LJ (action by head carrier against security company for loss of consignment through theft; claim failed because head carrier had neither contract with security company nor sufficient immediate right to possession of goods to sustain action in tort for negligence or in bailment). As to damages in tort see PARA 851 et seq ante. As to damages in bailment see PARA 1088 et seq post.

5 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL; explaining *Dunlop v Lambert* (1839) 6 Cl & Fin 600, HL. As to extra-compensatory awards in contract see further PARA 1001 et seq ante.

6 As to damages in contract generally see PARA 941 et seq ante.

7 As to damages in tort see PARA 851 et seq ante.

8 As to damages in bailment see PARAS 1088 et seq post.



9 There is no general liability in tort for negligence where economic loss results from a carrier's negligent delay: *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774 at 846-847, [1976] 3 All ER 129 at 137, HL, per Lord Diplock; and see CARRIAGE AND CARRIERS vol 7 (2008) PARA 757.

10 *Hadley v Baxendale* (1854) 9 Exch 341; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, sub nom *Koufos v C Czarnikow Ltd*, *The Heron II* [1967] 3 All ER 686, HL.

11 *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, sub nom *Koufos v C Czarnikow Ltd*, *The Heron II* [1967] 3 All ER 686, HL. There may be more than one potential market, in which event that market must be identified which is the most appropriate or relevant to the claim, and the adoption of which is best calculated to compensate the claimant: *Charrington & Co Ltd v Wooder* [1914] AC 71, HL (two market prices for same beers, one for tied tenants, one for non-tied tenants); *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, [1977] 3 All ER 1048, HL (whiskey stolen in England while in transit from Scotland; claim against carriers under Carriage of Goods by Road Act 1965; court obliged to choose between domestic (duty-payable) and export (ex-duty) market for purpose of fixing value of consignment at time and place accepted for carriage; market price held to be value ex-duty). See further CARRIAGE AND CARRIERS vol 7 (2008) PARA 776.

12 As to remoteness of damage see PARA 1015 et seq ante. Many of the leading cases on remoteness of damage in contract involve carriers: see eg *Hadley v Baxendale* (1854) 9 Exch 341; *Koufos v C Czarnikow Ltd* [1969] 1 AC 350, sub nom *Koufos v C Czarnikow Ltd*, *The Heron II* [1967] 3 All ER 686, HL.

13 Such as loss of a particularly lucrative market or contract.

14 As to causation see PARA 1035 et seq ante.

15 *Gee v Lancashire and Yorkshire Rly* (1860) 6 H & N 211; *Horne v Midland Rly Co* (1872) LR 7 CP 583; *British Columbia Saw-Mill Co Ltd v Nettleship* (1868) LR 3 CP 499; *Slater v Hoyle & Smith* [1920] 2 KB 11, CA, especially at 20 per Scrutton LJ; *Heskell v Continental Express* [1950] 1 All ER 1033, *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA; *André & Cie SA v J H Vantol Ltd* [1952] 2 Lloyd's Rep 282; cf *B Sunley & Co Ltd v Cunard White Star Ltd* [1939] 2 KB 791 (revsd in part [1940] 1 KB 740, [1940] 2 All ER 97, CA). See also *Wilson v Newport Dock Co* (1866) LR 1 Exch 177, 4 H & C 232.

16 'It must be remembered when dealing with the case of a carrier of goods by land, sea or air, he is not carrying on the same trade as the consignor of the goods and his knowledge of the practices and exigencies of the other's trade may be limited and less than between buyer and seller of goods who probably know far more about one another's business': *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 at 424, sub nom *Koufos v C Czarnikow Ltd*, *The Heron II* [1967] 3 All ER 686 at 717, HL, per Lord Upjohn; cited and approved in *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* 1994 SLT 807 at 810, HL, per Lord Jauncey of Tullichettle. See also *Heskell v Continental Express* [1950] 1 All ER 1033 at 1049, per Devlin J; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 537, [1949] 1 All ER 997 at 1001, CA, per Asquith J; *André & Cie SA v JH Vantol* [1952] 2 Lloyd's Rep 282.

17 Cf *B Sunley & Co Ltd v Cunard White Star Ltd* [1939] 2 KB 791 (on appeal [1940] 1 KB 740, [1940] 2 All ER 97, CA); *Simpson v London and North Western Rly Co* (1876) 1 QBD 274, CA; *Jameson v Midlands Rly* (1884) 50 LT 426; *Schulze & Co v Great Eastern Rly* (1887) 19 QBD 30; *Monte Video Gas and Dry Dock Co Ltd v Clan Line Steamers Ltd* (1921) 37 TLR 866; *SS Ardennes (Cargo Owners) v SS Ardennes (Owners)* [1951] 1 KB 55, [1950] 2 All ER 517; *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA*, *The Pegase* [1981] 1 Lloyd's Rep 175. Cf *Ströms Bruks Aktiebolag v John and Peter Hutchison* [1905] AC 515.

## UPDATE

### 1055 Carriers of goods

NOTE 17--See also *Transfield Shipping Inc v Mercator Shipping Inc*, *The Achilles* [2008] UKHL 48, [2008] 4 All ER 159, [2008] 3 WLR 345.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(3) CONTRACT: PARTICULAR TRANSACTIONS/1056. Sale of goods.

### 1056. Sale of goods.

In a contract for the sale of goods<sup>1</sup>, the normal measure of damages is amplified by statute<sup>2</sup>. The measure of damages in an action against a buyer for non-acceptance of goods<sup>3</sup> is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract<sup>4</sup>. Where there is an available market for the goods in question<sup>5</sup>, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept<sup>6</sup>. The measure of damages in an action against a seller for wrongful neglect or refusal to deliver the goods to the buyer<sup>7</sup> is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract<sup>8</sup>. Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept<sup>9</sup>. The same principles and measures of loss apply (*mutatis mutandis*) where a buyer brings an action against the seller for breach of warranty<sup>10</sup>. These statutory measures<sup>11</sup> correspond broadly with the ordinary common law principles by which damages are awarded for breach of contract<sup>12</sup>. They reflect, but are ultimately subject to<sup>13</sup>, the normal common law measure of damages awarded under contracts generally<sup>14</sup>, in other words, that sum of money which will put the innocent party in the position he would have occupied, had the contract been performed<sup>15</sup>. That normal measure may, in the event, prove to be more or less than the measure indicated by the statute<sup>16</sup>, and the normal principles of assessment<sup>17</sup> may (according to circumstance) afford more or less than an exact indemnity<sup>18</sup>. Whether an onward contract for the resale of the goods is to be taken into account in assessing the damages payable by the original seller to the original buyer in an action for breach of warranty or non-delivery against the seller is considered elsewhere<sup>19</sup>.

1 See generally SALE OF GOODS AND SUPPLY OF SERVICES.

2 See by the Sale of Goods Act 1979: see also SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 309 et seq.

3 See *ibid* s 50(1).

4 See *ibid* s 50(2). See also *Crystal Knitters Ltd v BRS Kumar Bros Ltd* [1988] BTLC 212, CA (failure to open letter of credit).

5 There may be more than one market: see PARA 1055 note 11 ante.

6 See the Sale of Goods Act 1979 s 50(3). 'If the seller actually offers the goods for sale there is no available market unless there is one actual buyer on that day at a fair price; that if there is no actual offer for sale, but only a notional or hypothetical sale ..., there is no available market unless on that day there are in the market sufficient traders potentially in touch with each other to evidence a market in which the actual or notional seller could if he wished sell the goods... [W]here there is no actual sale, the market price must be a fair market price for the total quantity of goods assuming them to have been sold by a seller on the relevant date; but that, since it might be unfair to the defendant purchaser to confine the price so established to the price obtainable if an actual sale had to be concluded on that day, it is permissible to take into account the price which would be negotiated within a few days with persons who were members of the market on that day and who could not be taken into account as potential buyers on the day in question only because of difficulties of communication. If account is taken of the price which would have been negotiated after a few days, no account can be taken of any price fluctuations after the date of the breach': *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd (No 2)* [1990] 3 All ER 723 at 730-731, [1990] 1 Lloyd's Rep 441 at 447, per Webster J.

With respect to claims for loss of profit for wrongful refusal to take delivery, such a claim will lie against a buyer in circumstances where supply exceeds demand because the seller would have effectively lost a sale (*WL Thompson Ltd v Robinson (Gunmakers) Ltd* [1955] Ch 177, [1955] 1 All ER 154). Conversely, where demand exceeds supply no claim for loss of profit will lie as there is in effect no lost sale (*Charter v Sullivan* [1957] 2 QB 117, [1957] 1 All ER 809, CA). In the case of second hand goods, the ability to claim loss of profit for a lost sale will depend upon how unique the goods are. If the goods are extremely rare or unique so that there is no available market, an argument for loss of profit (by reason of a lost chance of a second sale) will fail because the loss is too remote (*Lazenby Garages Ltd v Wright* [1976] 2 All ER 770, [1976] 1 WLR 459, CA).

7 See the Sale of Goods Act 1979 s 51(1); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 292.

8 See *ibid* s 51(2); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 293.

9 See *ibid* s 51(3); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 294.

10 See *ibid* s 53(2), (3); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 309. The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage: see *ibid* s 53(4); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 308.

11 The statutory measures are not absolute, even within their immediate sphere of contracts for the sale of goods, and in many situations the measure of damages actually awarded will differ from that set out in the statute: *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 97, [1997] 1 All ER 979 at 987, CA, per Otton LJ, where examples are given. See also *Shearson Lehman Hutton Inc v MacLaine Watson & Co Ltd (No 2)* [1990] 3 All ER 723, [1990] 1 Lloyd's Rep 441.

12 *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 93-94, [1997] 1 All ER 979 at 983-984, CA, per Otton LJ, and at 102 and 991-992 per Auld LJ.

13 In *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA, a case involving breach of warranty, opinion was divided as to whether the statutory measure set out in the Sale of Goods Act 1979 s 53(3) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 309-310) affords a starting point or presumptive measure in determining the recoverable loss: see *Bence Graphics International Ltd v Fasson UK Ltd* supra at 987 and 215 per Otton LJ, citing *Biggin & Co Ltd v Permanite Ltd* [1951] 1 KB 422 at 435-436, [1950] 2 All ER 859 at 868-869 per Devlin J, who regarded the statutory measure as constituting a presumption and held that the burden of rebutting that presumption, and of showing that a measure other than the statutory measure applied, lay on the party (buyer or seller) who sought to depart from that statutory measure. See also *Bence Graphics International Ltd v Fasson UK Ltd* supra at 991 and 217 per Auld LJ who said: 'As to [the Sale of Goods Act] s 53(3), there is, in my view, a danger of giving it a primacy in the code of s 53 that it does not deserve. The starting point in a claim for breach of a warranty of quality is not to determine whether one or the other party has 'displaced' the prima facie test in that subsection. The starting point is the *Hadley v Baxendale* principle reproduced in s 53(2) applicable to a breach of any warranty, namely an estimation on the evidence, of 'the ... loss directly and naturally resulting in the ordinary course of events from the breach of warranty'. The evidence may be such that the prima facie test in s 53(3) never comes into play at all'. As to the principle in *Hadley v Baxendale* (1854) 9 Ex 341 see PARA 1015 et seq ante.

14 *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 93-94, [1997] 1 All ER 979 at 983-984, CA, per Otton LJ and at 102 and 991-992 per Auld LJ.

15 *Robinson v Harman* (1848) 1 Ex 850 at 855 per Parke B; *Ruxley Electronics and Construction v Forsyth* [1996] 1 AC 344, [1995] 3 All ER 268, HL.

16 See *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87 at 97, [1997] 1 All ER 979 at 987, CA, per Otton LJ (proper measure may be less than that indicated by the statute). See also, cited in *Bence Graphics International Ltd v Fasson UK Ltd* supra, *Hammond & Co v Bussey* (1887) 20 QBD 79, CA; *Kasler and Cohen v Slavovski* [1928] 1 KB 78 (buyers recovering from sellers costs of litigation with third parties, engendered by sellers' breach); *Richard Holden Ltd v Bostock & Co Ltd* (1902) 18 TLR 317, CA; *Bostock & Co Ltd v Nicholson & Sons Ltd* [1904] 1 KB 725 (buyers recovering lost value of commodities owned by buyers and spoiled by mixture with defective commodities supplied by sellers).

17 Including, but not limited to, the predictability of the loss to the party in breach. As to remoteness of damage see PARA 1015 et seq ante.

18 *Slater v Hoyle & Smith* [1920] 2 KB 11 at 24, CA, per Scrutton LJ.

19 See PARA 969 et seq ante. There is clear modern recognition that a contracting party's failure to receive the benefit for which it bargained may count as a loss in itself, generating a right to substantial damages,

regardless of whether that party suffers actual financial detriment: *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 96-97, [1993] 3 All ER 417 at 421-422, HL, per Lord Griffiths, and at 112 and 434-435 per Lord Browne-Wilkinson. In *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* supra, Lord Browne-Wilkinson cited *Slater v Hoyle & Smith* [1920] 2 KB 11, CA, as showing that in a contract for the sale of goods 'the purchaser is entitled to damages for delivery of defective goods assessed by reference to the difference between the contract price and the market price of the defective goods, irrespective of whether he has managed to sell on the goods to a third party without loss ... see also as to non-delivery *Williams Bros v ED T Agius Ltd* [1914] AC 510, HL'. Cf *Bence Graphics International Ltd v Fasson UK Ltd* [1998] QB 87, [1997] 1 All ER 979, CA.

## **UPDATE**

### **1056-1057 Sale of goods, Work and labour**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **1056 Sale of goods**

NOTE 6--See also *Westbrook Resources Ltd v Globe Metallurgical Inc* [2009] EWCA Civ 310, [2009] 2 All ER (Comm) 1060.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(3) CONTRACT: PARTICULAR TRANSACTIONS/1057. Work and labour.

### **1057. Work and labour.**

When contracts for work and labour involve the ancillary transfer of property in goods<sup>1</sup> they are also termed contracts for work and materials and are now governed by legislation<sup>2</sup> implying terms as to title<sup>3</sup>, correspondence with description<sup>4</sup>, quality and fitness for purpose<sup>5</sup> and correspondence with sample<sup>6</sup> similar to those implied by statute in sale of goods<sup>7</sup>. These terms impose absolute obligations in respect of the materials<sup>8</sup>. Implied terms in respect of services require that the supplier, acting in the course of a business, should show reasonable care and skill<sup>9</sup> and carry out the task in a reasonable time<sup>10</sup> and for a reasonable charge unless otherwise agreed<sup>11</sup>. In principle it would seem that in applying this legislation the measure of damages for sale of goods (difference between contract and market price) should apply to the materials element and the measure of damages for employment contracts should apply to the work element<sup>12</sup>. Authorities prior to this legislation, when similar terms were implied at common law, indicate that when, in relation to fitness for purpose of materials, the transferee must show reliance on the skill or judgment of the transferor this may be found where the transferee is relying totally on the skill of a specialist who has full knowledge of the precise purpose to be achieved<sup>13</sup>. Further in determining the extent of the loss suffered by the transferee in wasted overheads, other wasted expenditure and loss of alternative business, the court may take a commercially practicable approach to evidence and require the defendant to prove that these losses did not occur rather than leaving the onus with the plaintiff<sup>14</sup>. Authorities further indicate that in respect of the work element the measure of damages for failure to perform a contract for work and labour is *prima facie* the increased cost of having the work done by another contractor<sup>15</sup>. Where a manufacturer is employed to execute work on a chattel and fails to complete the work within the time limited by the contract, or, if no time is limited by it, within a reasonable time, the plaintiff is entitled to recover the loss which he has directly sustained by the delay together with any expense he has reasonably incurred in minimising that loss.

If a profit would normally arise from the chattel, as where it is known to be required for sale or for employment in profit-earning trade, the measure of damages in respect of the delay is *prima facie* the sum which would have been earned in the ordinary course of employment of the chattel in the time<sup>16</sup> or, where a substitute has been hired, the hire paid<sup>17</sup>. Thus where delay occurs in executing repairs to a trading ship the owners are entitled to the net profits which the ship might have been reasonably expected to earn during the period of delay<sup>18</sup>.

Where no loss of profit arises, either because none is proved or because the chattel is not used for profit, the measure of damages caused by a breach of contract for delay in delivery is not less than in a claim in tort for temporary deprivation of the use of the chattel by the defendant's negligence<sup>19</sup>, and this will in each case be the value to the plaintiff of the use of the chattel which he has lost<sup>20</sup>. Similarly, where delay occurs through repairs having been improperly executed to a ship, the owner may recover the loss sustained by him as a result of the ship's detention whilst the repairs are made good<sup>21</sup>.

In addition to damages for loss of use during the period of delay the contractor is liable for any other loss directly resulting from his breach of contract<sup>22</sup>. Thus he is liable for any further damage to a machine caused by his breach of contract to repair<sup>23</sup> and which is its direct physical result<sup>24</sup>. He may also be liable for a special loss arising naturally in circumstances of which he has knowledge, and so, in such circumstances, where delay occurs in executing repairs to a threshing machine, damages may be recovered for the deterioration of the plaintiff's wheat by rain, and for the expense of stacking the wheat and drying it<sup>25</sup>.

- 1 *Robinson v Graves* [1935] 1 KB 579, CA.
- 2 In the Supply of Goods and Services Act 1982: see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 3.
- 3 See *ibid* s 2; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 70, 468.
- 4 See *ibid* s 3; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 75, 468.
- 5 See *ibid* s 4 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 83 et seq, 468.
- 6 See *ibid* s 5 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 95, 468.
- 7 See the Sale of Goods Act 1979 ss 12-15 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 467.
- 8 For similar terms implied at common law see *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, [1968] 2 All ER 1169 HL (even when product to be used specified); *GK Serigraphics (a firm) v Dispro Ltd* (15 December 1980, unreported), CA; *Stewart v Reavell's Garage* [1952] 2 QB 545, [1952] 1 All ER 1191.
- 9 See the Supply of Goods and Services Act 1982 s 13; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 97, 470.
- 10 See *ibid* s 14; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 98, 470.
- 11 See *ibid* s 15; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 99, 470.
- 12 Where the contract involves work and materials and is terminated for default by the payer, advance payments and instalments which have been earned prior to termination may be claimed by the supplier: *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 All ER 29, [1980] 1 WLR 1129, HL (shipbuilding instalment payment). See also *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] 1 WLR 574, HL. This is not so in a contract for sale of goods (see *Dies v British and International Mining and Finance Corp Ltd* [1939] 1 KB 724, 108 LJB 398) except in relation to forfeitable deposits. The distinction between advance payments and deposits depends on the intention of the parties.
- 13 *GK Serigraphics (a firm) v Dispro Ltd* (15 December 1980, unreported), CA, per Cumming Bruce LJ.
- 14 *GK Serigraphics (a firm) v Dispro Ltd* (15 December 1980, unreported), CA. Whether the defence of contributory negligence applies to the implied term as to skill and care was left open in *Barclays Bank plc v Fairclough Building Ltd* [1995] 1 QB 214 at 229, [1995] 1 All ER 289 at 300, CA, per Beldam LJ. See PARA 1047 ante.
- 15 As to building contracts see PARA 1054 ante; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS. As to work and labour on chattels generally see BAILMENT vol 3(1) (2005 Reissue) PARA 68 et seq.
- 16 *Re Trent and Humber Co, ex p Cambrian Steam Packet Co* (1868) 4 Ch App 112 at 117 per Lord Cairns LC. Loss of profit from a special use or purpose unknown to the defendant, such as under an uncommunicated sub-contract, will not be allowed, but where this is the case a reasonable compensation for the loss of use may nevertheless be given on the basis of an obvious use: see *Cory v Thames Ironworks Co* (1868) LR 3 QB 181; *Elbinger AG v Armstrong* (1874) LR 9 QB 473.
- 17 *Strathfillan (Owners) v Ikala (Owners), The Ikala* [1929] AC 196, 17 Asp MLC 555, HL.
- 18 *Re Trent and Humber Co, ex p Cambrian Steam Packet Co* (1868) 4 Ch App 112 at 117 per Lord Cairns LC.
- 19 *B Sunley & Co Ltd v Cunard White Star Ltd* [1940] 1 KB 740 at 745, [1940] 2 All ER 97 at 100, CA, per Clauson LJ, delivering the judgment of the court (no evidence of loss). Cf *Mediana (Owners) v Comet (Owners, Master and Crew), The Mediana* [1900] AC 113 at 118, HL, per Lord Halsbury LC. As to damages for loss of use of a chattel see further PARA 860 et seq ante.
- 20 Various methods of calculation have been adopted, and it is recognised that however elaborate the inquiry the result must always be, as applied to the real situation, more or less arbitrary: see *Admiralty Comrs v SS Susquehanna, The Susquehanna* [1926] AC 655 at 669, HL, per Lord Blanesburgh; *The Greta Holme* [1897] AC 596, HL; *The Marpessa* [1907] AC 241, HL (dredgers not commercially employed); *Admiralty Comrs v SS Chekiang* [1926] AC 637, HL (warship); *Birmingham Corp v Sowsbery* [1970] RTR 84, 67 LGR 600 (omnibus); *Alexander v Rolls Royce Ltd* [1996] RTR 95, (1996) Times, 4 May, CA (private car).

21 *Wilson v General Iron Screw Colliery Co Ltd* (1877) 47 LJQB 239 (amount awarded for the period of delay based on the vessel's average earnings). Delay in making or repairing a vital part of a machine may necessarily result in loss of use of the machine for which the defaulting contractor will be liable: see *Hydraulic Engineering Co v McHaffie* (1878) 4 QBD 670, CA. The fact that the delay arises in the delivery of part of a profit-earning whole is significant only in so far as it bears on the supplier's capacity to foresee the consequences of non-delivery: *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 543, [1949] 1 All ER 997 at 1005, CA, per Asquith LJ.

22 See *Kliger v Sadwick* [1947] 1 All ER 840, 63 LQR 273 (loss of clothing coupons expended on material to be worked on).

23 *Vaile Bros v Hobson Ltd* (1933) 149 LT 283 (repair of lorry carburettor). The duty to mitigate only arises when the plaintiff neglects a reasonable opportunity of remedying the consequences of the breach: *Vaile Bros v Hobson Ltd* supra. As to mitigation see PARA 1041 et seq ante.

24 *Vaile Bros v Hobson Ltd* (1933) 149 LT 283 at 284 per Talbot J.

25 *Smeed v Foord* (1859) 1 E & E 602. The loss due to an unexpected fall in the market price of wheat during the period of delay was not recoverable: see *Smeed v Foord* supra at 608 per Lord Campbell; cf *Portman v Middleton* (1858) 4 CBNS 322 (unknown special circumstances: no liability).

## UPDATE

### 1056-1057 Sale of goods, Work and labour

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(3) CONTRACT: PARTICULAR TRANSACTIONS/1058. Surveyors and valuers.

### 1058. Surveyors and valuers.

Subject to the general principles<sup>1</sup> of remoteness<sup>2</sup>, causation<sup>3</sup>, mitigation<sup>4</sup> and contributory negligence<sup>5</sup>, in an action<sup>6</sup> by a vendor or purchaser on a negligent overvaluation the measure of damages is the difference between the value as represented by the defendant<sup>7</sup> and the actual value at the time of sale<sup>8</sup> even if the purchaser sells the property for more than he paid before the valuer is found liable<sup>9</sup>. On a sale on a negligent undervaluation the vendor may recover the difference between the market value and the sale price<sup>10</sup>. A purchaser will not recover the cost of repairing defects overlooked by the valuer<sup>11</sup> but the defects may be relevant to assessing the actual value<sup>12</sup>. Expenses of disposing of a defective property and modest sums for inconvenience and discomfort may be recovered<sup>13</sup>. A mortgage lender cannot recover more than the amount of the overvaluation since the valuer, in the absence of fraud, is liable only for foreseeable consequences<sup>14</sup>. Hence the valuer is not liable for losses resulting from a subsequent fall in property prices since there is no duty in respect of losses which would have occurred even if the valuation was correct, the valuer only being responsible for the consequences of the valuation being wrong<sup>15</sup>. Subject to this, if the mortgagee would not have lent if the valuation had been accurate the measure of damages is the full amount lent<sup>16</sup>, with incidental costs<sup>17</sup>, less any recovery on sale of the property or repayment by the borrower<sup>18</sup>. If the lender would have advanced a smaller sum the measure is the difference between the sum lent and the smaller amount which would have been lent and lost on an accurate valuation, less any repayment by the borrower<sup>19</sup>. There may be recovery for interest which would have been otherwise earned<sup>20</sup> but not at a rate as high as in the defective transaction unless it is shown that it could have been obtained elsewhere<sup>21</sup>. Damages based on cost of repairs are not recoverable<sup>22</sup>.

1 As to damages for negligent valuation generally see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 305 et seq. As to a valuer's liability to third parties see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARAS 299-300.

2 See *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365, HL; *Thomas Miller & Co v Richard Saunders & Partners* [1989] 1 EGLR 267; *Morgan v Perry* (1973) 229 EG 1737; *Allen v Ellis & Co* [1990] 1 EGLR 170, [1990] 11 EG 78. As to remoteness see PARA 1015 et seq ante.

3 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365, HL. See also *Rona v Pearce* (1953) 162 EG 380; *Kenney v Hall, Pain and Foster* [1976] 2 EGLR 29 at 35 per Goff J; *JEB Fasteners Ltd v Marks Bloom & Co (a firm)* [1983] 1 All ER 583 at 589, CA, per Stephenson LJ; *Shankie-Williams v Heavey* [1986] 2 EGLR 139, CA; *HIT Finance Ltd v Lewis & Tucker Ltd* [1993] 2 EGLR 231, 9 PN 33; *Oswald v Countrywide Surveyors Ltd* [1996] 37 EG 140, CA. As to causation see PARA 1035 et seq ante.

4 *Cross v David Martin and Mortimer* [1989] 1 EGLR 154 at 159 per Phillips J; *Perry v Sidney Phillips & Son* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA. Repayments by a borrower must be brought into account but not collateral benefits such as insurance or a discretionary repair grant: *Trem l v Ernest W Gibson & Partners* [1984] 2 EGLR 162 at 164 per Popplewell J. As to mitigation see PARA 1041 et seq ante.

5 *Yianni v Edwin Evans & Sons* [1982] QB 438, [1981] 3 All ER 592; *Davies v Parry* [1988] 1 EGLR 147; *Allen v Ellis & Co* [1990] 1 EGLR 170 at 172 per Garland J; *PK Finans International (UK) Ltd v Andrew Downs & Co Ltd* [1992] 1 EGLR 172; *HIT Finance Ltd v Lewis & Tucker Ltd* [1993] 2 EGLR 231, 9 PN 33; *Nyckeln Finance Co Ltd v Stumpbrook Continuation Ltd* [1994] 2 EGLR 143, 33 EG 93; *United Bank of Kuwait plc v Prudential Property Services Ltd* [1995] EGCS 190, CA; *Platform Home Loans Ltd v Oyston Shipways Ltd* [1998] 3 WLR 94, 13 EG 148, CA; *Cavendish Funding Ltd v Henry Spencer & Sons Ltd* [1998] PNLR 122. As to contributory negligence see PARA 1047 et seq ante; and NEGLIGENCE vol 78 (2010) PARA 75 et seq.

6 As to valuation for insurance see *Beaumont v Humberts* [1990] 2 EGLR 166, (1990) Times 17 July, CA.



7 If the property is worth the negligently represented value there will be nominal damages in contract: *Ford v White & Co* [1964] 2 All ER 755 at 758-761, [1964] 1 WLR 885 at 888-892 per Pennycuik J (special agreement precluded award).

8 The figure that a reasonable valuer would have put on the property, not the highest non-negligent valuation: *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 220, [1996] 3 All ER 365 at 378 per Lord Hoffmann, HL; *Philips v Ward* [1956] 1 All ER 874, [1956] 1 WLR 471, CA; *Perry v Sidney Phillips & Son* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA; *Watts v Morrow* [1991] 4 All ER 937 at 945, [1991] 1 WLR 1421 at 1430, CA, per Gibson LJ; *Gardner v Marsh and Parsons* [1997] 3 All ER 871, [1997] 1 WLR 489, CA (at date of purchase and action by plaintiff had no effect unless it flowed inexorably from the transaction or was a continuous course of dealing). If the plaintiff paid more than the represented figure the excess is not recoverable: *Hardy v Walmsley-Lewis* (1967) 203 EG 1039. Cf *Oswald v Countrywide Surveyors Ltd* [1996] 2 EGLR 104, CA, where such a price was treated as best evidence of actual value in condition as represented.

9 *Perry v Sidney Phillips & Son* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA. Damages are assessed as at the date when the plaintiff became legally committed and bear interest from that date to judgment except when there is payment before judgment. *Watts v Morrow* [1991] 4 All ER 937 at 960, [1991] 1 WLR 1421 at 1446, CA, per Bingham LJ (refusal to interfere with discretion of trial judge on rate of interest). In negligent overvaluation the cause of action arises whenever a relevant and measureable loss is first recorded which will usually be default by the borrower; but the lender may show loss at an earlier date. Interest may run from these times: *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305, [1997] 1 WLR 1627, HL. As to interest see the Supreme Court Act 1981 s 35A(1) (added by the Administration of Justice Act 1982 s 15(1), Sch 1 Pt 1); and PARA 848 ante.

10 *Weedon v Hindwood, Clarke and Esplin* [1975] 1 EGLR 82.

11 *Philips v Ward* [1956] 1 All ER 874, [1956] 1 WLR 471, CA; *Perry v Sidney Phillips & Son* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA; *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 1421, CA. There may be recovery for discomfort whilst repairs are effected: see *Watts v Morrow* supra at 960 and 1445 per Bingham LJ.

12 *Steward v Rapley* [1989] 1 EGLR 159, CA. As to disadvantageous terms in a lease see *Simple Simon Catering Ltd v Binstock Miller & Co* (1973) 228 EG 527 at 529, CA, per Lord Denning MR. See generally LANDLORD AND TENANT.

13 *Philips v Ward* [1956] 1 All ER 874 at 879, [1956] 1 WLR 471 at 478, CA, per Morris LJ; *Watts v Morrow* [1991] 4 All ER 937 at 950, [1991] 1 WLR 1421 at 1435, CA, per Gibson LJ and at 959 and 1445 per Bingham LJ; *Heatley v William H Brown Ltd* [1992] 1 EGLR 289 at 296 per Judge Bowsher QC (incidental expenses). Distress and discomfort must result from the physical consequences of the breach: *Ezekiel v McDade* [1995] 2 EGLR 107 at 110, CA, per Nourse LJ. As to discomfort suffered whilst repairs are effected even though there is no claim for the repairs: see *Watts v Morrow* supra at 960 and 1445 per Bingham LJ. In the absence of physical causes there is no recovery for discomfort and inconvenience.

14 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365, HL.

15 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365, HL. See further BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 307.

16 *Baxter v FW Gapp & Co Ltd* [1938] 4 All ER 457; affd [1939] 2 KB 271, [1939] 2 All ER 752, CA. Damages should not be assessed at the date of breach and should not reflect the difference between the amount lent and the rights of the lender under the mortgage: *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365, HL. It was also suggested, at 218 and 376 per Lord Hoffmann that the distinction between 'no success' and 'success' cases (no loan or smaller loan) should be abandoned, even though it had pragmatic utility.

17 *Baxter v FW Gapp & Co Ltd* [1938] 4 All ER 457 (affd [1939] 2 KB 271, [1939] 2 All ER 752, CA); *Swingcastle Ltd v Alistair Gibson* [1991] 2 AC 223, [1991] 2 All ER 353, HL.

18 *London and South of England Building Society v Stone* [1983] 3 All ER 105, [1983] 1 WLR 1242, CA. The mortgagee will not have to account for sums which could have been but are not recovered unless there is failure to mitigate: *London and South of England Building Society v Stone* supra.

19 *Corisand Investments Ltd v Druce & Co* [1978] 2 EGLR 86. Costs of repossessing and reselling are not recoverable since they would have been incurred in any event.

20 *Swingcastle Ltd v Alistair Gibson* [1991] 2 AC 223, [1991] 2 All ER 353, HL; overruling on this point *Baxter v FW Gapp & Co Ltd* [1938] 4 All ER 457 (affd [1939] 2 KB 271, [1939] 2 All ER 752, CA).

21 *Swingcastle Ltd v Alistair Gibson* [1991] 2 AC 223, [1991] 2 All ER 353, HL; *Corisand Investments Ltd v Druce & Co* [1978] 2 EGLR 86; *HIT Finance Ltd v Lewis & Tucker Ltd* [1993] 2 EGLR 231, 9 PN 33.

22 *London and South of England Building Society v Stone* [1983] 3 All ER 105, [1983] 1 WLR 1242, CA.

## **UPDATE**

### **1058 Surveyors and valuers**

NOTE 9--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 13--See *Patel v Hooper & Jackson* [1999] 1 All ER 992, CA (mortgage interest and insurance premiums not recoverable).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(3) CONTRACT: PARTICULAR TRANSACTIONS/1059. Sale of land.

### 1059. Sale of land.

When upon a contract for the sale of land the purchaser wrongfully refuses to complete, the measure of damages is the injury sustained by the vendor<sup>1</sup>. If the vendor has resold the land at a lower price within a reasonable time of the breach<sup>2</sup> the difference in price as well as the expenses occasioned by the resale may be recovered as damages naturally resulting from the breach<sup>3</sup>.

Where it is the vendor who wrongfully refuses to complete, the measure of damages is, similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest together with expenses which he has incurred in investigating title<sup>4</sup> and other expenses within the contemplation of the parties<sup>5</sup>, and, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price<sup>6</sup>, damages for loss of bargain<sup>7</sup>.

In relation to contracts made on or after 27 September 1989, it is possible for the purchaser to recover damages for loss of bargain even where the vendor fails to convey through a defect of title<sup>8</sup>.

In relation to contracts made both before and after 27 September 1989, it is possible for a purchaser to recover damages for loss of bargain where the inability of the vendor to give a good title is occasioned by his own default<sup>9</sup>, or where he can make out a good title but refuses to do so<sup>10</sup>, or where he otherwise deliberately refuses to complete the sale, as for example when he has sold elsewhere for a better price<sup>11</sup>.

1 *Laird v Pim* (1841) 7 M & W 474; *York Glass Co Ltd v Jubb* (1925) 134 LT 36, CA (the date of repudiation is the material date for the ascertainment of damages where no date is fixed for completion). Subject to the terms of the contract any reasonable deposit paid by the purchaser can be retained by the vendor where the purchaser abandons or repudiates the contract, or where the vendor lawfully rescinds, whether the vendor has suffered actual loss or not (see *Howe v Smith* (1884) 27 ChD 89, CA; *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573, [1993] 2 All ER 370, PC), but if the vendor sues for damages any deposit retained by him must be taken into account (*Ockenden v Henly* (1858) EB & E 485). See generally CONTRACT; SALE OF LAND.

2 The vendor is not bound to nurse the land as a speculative builder and gradually sell it: *Keck v Faber, Jellett and Keeble* (1915) 60 Sol Jo 253.

3 *Noble v Edwardes* (1877) 5 ChD 378, CA; and see SALE OF LAND. As to causation see PARA 1035 et seq ante.

4 *De Bernales v Wood* (1812) 3 Camp 258; *Walker v Moore* (1829) 10 B & C 416; *Wallington v Townsend* [1939] Ch 588, [1939] 2 All ER 225 (all conveyancing costs wasted allowed, ie the cost of investigating title, searches, as well as of approving and executing the contract and preparing the conveyance). Damages should also include expenditure required by the contract even though it is actually incurred before the contract is executed: *Lloyd v Stanbury* [1971] 2 All ER 267, [1971] 1 WLR 535.

5 *Lloyd v Stanbury* [1971] 2 All ER 267, [1971] 1 WLR 535.

6 See *Wallington v Townsend* [1939] Ch 588, [1939] 2 All ER 225, where there was no such evidence; cf *Ridley v De Geerts* [1945] 2 All ER 654, CA, where there was such evidence. As to repudiation of a contract see CONTRACT vol 9(1) (Reissue) PARA 997 et seq.

7 The damages will prima facie be the difference between the purchase price and the market price: *Ridley v De Geerts* [1945] 2 All ER 654, CA. Where appropriate, the measure of damages may be assessed on the basis of the difference between the contract price and the market value of the property on the date when the purchaser lost his purchase, rather than at the date of completion: *Suleman v Shahsavari* [1989] 2 All ER 460,

[1989] 1WLR 1181. In *Suleman v Shahsavari* supra it was determined that the purchaser had lost his purchase on the date of judgment. See also *Malhotra v Choudhury* [1980] Ch 52, [1979] 1 All ER 186, CA, where the value of the property was also assessed at the date of judgment rather than the date of completion, save that the date was moved back one year due to the plaintiff's delay in pursuing the claim. Where the market is active, and the purchaser could have subsold immediately, such general damages will be additional to the recovery of conveyancing costs incurred, even if the purchaser is buying for his own occupation: *Ridley v De Geerts* supra; cf *Re Daniel, Daniel v Vassall* [1917] 2 Ch 405. See also *Diamond v Campbell-Jones* [1961] Ch 22, [1960] 1 All ER 583.

8 This is due to the abolition of the rule of law known as the rule in *Bain v Fothergill* (1874) LR 7 HL 158 (as stated in that case at 207 per Lord Chelmsford) by the Law of Property (Miscellaneous Provisions) Act 1989 ss 3, 5(3), (4): see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 94. Under the rule in *Bain v Fothergill* supra, although he could recover expenses necessarily incurred, the purchaser could not recover any damages for loss of bargain.

Where a vendor knowingly misrepresents himself to be in a position to sell a property, the purchaser is entitled to recover damages in misrepresentation not only for expenses incurred in consequence of the misrepresentation but also, by virtue of the Misrepresentation Act 1967 s 2(1), for other damages including damages for loss of bargain: *Watts v Spence* [1975] 2 All ER 528, [1976] Ch 165 (joint owner represented that he was the sole owner). *Watts v Spence* supra was not followed in *Cemp Properties (UK) v Dentsply Research & Development Corpn (No 2)* (1989) 36 EG 90, 37 EG 126, in which it was held that when damages are being assessed following the purchase of a property in reliance upon a misrepresentation, the usual formula of price paid less true value as at the time of the purchase is only a prima facie rule which should not be mechanistically employed.

9 *Engell v Fitch* (1869) LR 4 QB 659, Ex Ch; *Day v Singleton* [1899] 2 Ch 320, CA; *Jones v Gardiner* [1902] 1 Ch 191; *Braybrooks v Whaley* [1919] 1 KB 435, DC.

10 *Day v Singleton* [1899] 2 Ch 320, CA; cf *Re Daniel, Daniel v Vassall* [1917] 2 Ch 405.

11 *Ridley v De Geerts* [1945] 2 All ER 654, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(3) CONTRACT: PARTICULAR TRANSACTIONS/1060. Tenant's repairing covenant.

### **1060. Tenant's repairing covenant.**

There is a fundamental difference at common law in the measure of damages for a tenant's breach of his covenant to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, according to whether the landlord's action is brought (1) during the currency of the lease; or (2) at its determination<sup>1</sup>. If the action is brought during the term, the lessor is entitled to recover a sum equal to the diminution in the value of his reversion by reason of the want of repair<sup>2</sup>. He is not entitled to recover the cost of repair, which may have little relation to the damage caused to his reversionary interest, but if the term of the lease is drawing to a close, the costs of repair may well provide a guide to the diminution in the value of the reversion<sup>3</sup>. Breach of a general covenant to repair is a continuing breach; that is, prospective damages cannot be recovered but subsequent actions are not barred<sup>4</sup>. If the landlord's action is brought at the determination of the lease, then the cost of repair is the proper measure, whether or not the landlord intends to carry out any repairs and whether or not the want of repair by the tenant has diminished the value of his reversion<sup>5</sup>.

Statute has now intervened, and it is provided that damages can in no case exceed the amount, if any, by which the value of the reversion, whether immediate or not, is diminished owing to the breach of a tenant's repairing covenant<sup>6</sup>. It should be noted that statute has merely put a cap on the amount which a landlord can recover and has not altered the common law measure of damages for a tenant's breach of a repairing covenant<sup>7</sup>; the statutory ceiling in fact corresponds to the landlord's common law entitlement in an action brought during the currency of the term. However, it is further provided that no damages are recoverable for a breach of a covenant to leave or put premises in repair at the termination of a lease if the premises would, at or shortly after the termination of the tenancy, have been pulled down, or such structural alterations made in them as would render valueless the repairs covered by the covenant<sup>8</sup>.

If the landlord is entitled under the lease to enter and carry out repairs which are the responsibility of the tenant, he is entitled then to be reimbursed by the tenant for the actual cost of such repairs and recovery is not confined to the amount by which the value of his reversion has been diminished<sup>9</sup>. Such a claim, however, is not a claim for damages, but sounds in debt<sup>10</sup>. There would thus appear to be no statutory cap placed<sup>11</sup> on such a claim. The court may order specific performance of a tenant's repairing covenant in appropriate circumstances but should be astute not to circumvent the statutory restrictions on damages and procedural requirements<sup>12</sup>.

1 *Ebbetts v Conquest* [1895] 2 Ch 377 at 385-387, CA, per Rigby LJ. As to a tenant's covenant to keep or put premises in repair see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 427 et seq.

2 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 459.

3 *Conquest v Ebbetts* [1896] AC 490 at 494 per Lord Herschell; *Crewe Services and Investment Corp'n v Silk* (1998) Times, 2 January, CA (duration of term imponderable and the judge had wrongly relied upon *Jones v Herxheimer* [1950] 2 KB 106, [1950] 1 All ER 323 where the term had terminated). See further LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 454 et seq.

4 As to prospective damages see PARAS 810, 834 ante.

5 *Joyner v Weeks* [1891] 2 QB 31, CA (the leading case), following dicta in *Inderwick v Leech* (1884) 1 TLR 484; and *Morgan v Hardy* (1886) 17 QBD 770 at 779 per Denman J. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 460.

6 See the Landlord and Tenant Act 1927 s 18(1); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 460. The section has no application to an action brought by a tenant against a landlord for breach of his repairing covenant (as to which see PARA 1061 post).

7 The conceptual distinction made in the text between the measure of damages and the recoverable quantum allowed by ibid s 18 remains clear in *Jones v Herxheimer* [1950] 2 KB 106 at 119, [1950] 1 All ER 323 at 330 per Jenkins LJ. However, later cases dealing with claims made at the expiry of the term go straight to considering the diminution in the value of the reversion as the proper measure and use the cost of repairs as a guide: see eg *Smiley v Townshend* [1950] 1 KB 311, [1950] 1 All ER 530, CA; *Culworth Estates Ltd v Society of Licensed Victuallers* (1991) 62 P & CR 211, [1991] 2 EGLR 54, CA (plaintiffs recovered the alleged cost of repair, which they alleged was lower than the damage to their reversion, because that was what they pleaded and there was no other evidence before the court as to the diminution in the value of the reversion). Note though the observation in *Elite Investments Ltd v TI Bainbridge Silencers Ltd* [1986] 2 EGLR 43 at 47 per Judge Paul Baker QC: 'I do not have to consider the Landlord and Tenant Act 1927 s 18, because the costs of repairs ... is not greater than the diminution in the value of the reversion'. It is submitted that this reflects the true position, which can be encapsulated by the proposition that in an action brought during the term the lessor can recover, at least and at most, the diminution in the value of his reversion, whereas at the determination of the lease he can recover either the cost of repair or the diminution in value of his reversion whichever (since 1927) is the lowest: see Coote 'Contract Damages, *Ruxley*, and the Performance Interest' (1997) 56 CLJ at 555.

8 This is the second limb of the Landlord and Tenant Act 1927 s 18(1), reversing *Joyner v Weeks* [1891] 2 QB 31, CA, and it has no application to an action brought during the term: *Re King* [1962] 2 All ER 66, [1962] 1 WLR 632, CA. Conversely, the Leasehold Property Repairs Act 1938 s 1 (as amended), which places certain procedural restrictions upon a landlord's right to bring an action for damages against a tenant for breach of covenant (including a repairing covenant) (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 455 et seq), applies only during the currency of a lease.

9 *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA. This decision resolves the doubt expressed in *McGregor on Damages* (16th Edn, 1997) PARA 1054. As to the landlord's right of entry see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 449.

10 *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA; overruling *Swallow Securities Ltd v Brand* (1983) 45 P & CR 328, (1981) 260 EG 63.

11 Ie by the Landlord and Tenant Act 1927 s 18(1). In *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA, the Court of Appeal expressly held that the Leasehold Property Repairs Act 1938 has no application to claims in debt, which arise when a landlord has executed the repairs himself, but the Landlord and Tenant Act 1927 was not in issue. As to actions in debt see generally CIVIL PROCEDURE.

12 *Rainbow Estates v Tokenhold Ltd* [1998] 2 All ER 860; cf *Hill v Barclay* (1810) 16 Ves 402. The Landlord and Tenant Act 1927 s 18(1) and the Leasehold Property (Repairs) Act 1938 s 1 (as amended) (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 454 et seq) have no application to specific performance: see generally SPECIFIC PERFORMANCE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(3) CONTRACT: PARTICULAR TRANSACTIONS/1061. Landlord's repairing covenant.

### **1061. Landlord's repairing covenant.**

At common law, a landlord has no general obligation to put or keep<sup>1</sup> the demised premises in repair<sup>2</sup> or to put or keep in repair adjacent premises in which he has an interest<sup>3</sup>. A landlord's repairing covenant may be implied if it is correlative to obligations on the part of the tenant<sup>4</sup> or necessary for business efficacy (even in the case of residential premises)<sup>5</sup>. In the case of short residential leases, obligations to repair are implied by statute<sup>6</sup>. The normal situation though is for the landlord's repairing covenants to be set out in the lease together with those of the tenant, and the extent of his obligations is then a matter of construction.

The tenant is under the normal common law duty to mitigate any loss stemming from his landlord's failure to repair and must give prompt notice of want of repair, whether or not the landlord's obligation depends upon notice being given<sup>7</sup>. If the landlord does not remedy the situation within a reasonable time, the tenant may carry out the repairs himself and recoup the cost as damages from the landlord<sup>8</sup>. At common law, he may set the sum expended off against rent due; in equity, a tenant may set off the estimated cost of repairs against a claim by the landlord for arrears of rent<sup>9</sup>. The court has discretion to order specific performance of a landlord's repairing covenant<sup>10</sup>.

In an action for damages the normal contractual measure applies in the case of an action by a tenant against a landlord for breach of a covenant to repair; that is, the award is compensatory and intended to put the tenant in the position that he would have been in if the obligation to repair had been duly performed<sup>11</sup>, subject to the usual rules of remoteness<sup>12</sup>. This involves comparing the property as it was for the period when the landlord was in breach with what it would have been if the obligation had been performed<sup>13</sup>. The normal measure of damages is the difference in value to the tenant<sup>14</sup> of the premises in their unrepaired condition and their value if the landlord had fulfilled his obligation<sup>15</sup>. The tenant is not entitled to damages if he has suffered no real loss<sup>16</sup>, but there are no statutory limitations on quantum<sup>17</sup> or procedural requirements<sup>18</sup>. Breach of a covenant to repair (but not to put in repair)<sup>19</sup> gives a continuing right of action; hence prospective damages are not recoverable and subsequent actions may be brought notwithstanding prior recovery<sup>20</sup>.

Damages depend on the particular facts of the case, and the heads of damage (which are more diverse than in the case of a landlord's claim) should be specially pleaded<sup>21</sup>. Damages are based upon the landlord's delay in executing the repairs measured from the time when he should have put the works in train<sup>22</sup> to the time of assessment<sup>23</sup> together with consequential losses. The measure of damages in an action by a tenant may be taken as the cost of repairs<sup>24</sup> or the diminution in the value of the tenant's leasehold interest, depending upon the particular circumstances of the tenant<sup>25</sup>. As a matter of practicality, damages may be assessed with reference to rent payable during the relevant period<sup>26</sup> or the diminished value of his interest on a proposed sale<sup>27</sup>. Generally, the loss suffered by a tenant where he remains in occupation notwithstanding the landlord's breach, is the loss of comfort and convenience resulting from the property not being in the state of repair it ought to have been in if the landlord had not been in breach<sup>28</sup>. In such cases, damages for diminution in value and damages for discomfort are not distinct heads of damage but are merely different ways of expressing the same concept<sup>29</sup>. Where the tenant is forced to leave the property and either sell or sublet it due to the landlord's breach, the recoverable loss is that which equates with the diminution of the price or recoverable rent occasioned by the landlord's failure to keep the property in repair<sup>30</sup>. A court may ascertain the sum of damages in a number of ways. It may order a notional deduction of rent<sup>31</sup>, if the tenant is still in occupation, it may simply order a global amount

equating to the measured loss<sup>32</sup> or it may use a combination of these methods<sup>33</sup>. A landlord will not be liable merely because his tenant has to move out whilst repairs are being undertaken if he has not delayed<sup>34</sup>. Damages will be reduced if the landlord could have recouped the cost of repairs through a service charge<sup>35</sup>. Consequential losses within the contemplation of the parties are recoverable. These may include the physical inconvenience and consequent distress of living in accommodation out of repair<sup>36</sup>, the cost of taking alternative accommodation<sup>37</sup>, the cost of storing furniture<sup>38</sup>, the cost of repairing decorations<sup>39</sup> and compensation for burglary<sup>40</sup>. The tenant may be compensated for loss of income from sub-letting<sup>41</sup>, and damages can also be awarded for other consequential losses such as injury to person (pecuniary and non-pecuniary)<sup>42</sup> or goods<sup>43</sup>.

1 Repairing covenants are usually to put or to keep the premises in repair, and the latter imports the former if the premises are not already in repair; covenants merely 'to repair' are unusual, and in the text the expression is used to include covenants to put or to keep in repair. See further LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 413 et seq.

2 *Cockburn v Smith* [1924] 2 KB 119, CA; *Duke of Westminster v Guild* [1985] QB 688, [1984] 3 All ER 144, CA.

3 *Tennant Radiant Heat Ltd v Warrington Corpn* [1988] 1 EGLR 41, 11 EG 71, CA. The landlord may of course be liable in nuisance or negligence: see NEGLIGENCE vol 78 (2010) PARA 44; NUISANCE.

4 *Barrett v Lounova (1982) Ltd* [1990] 1 QB 348, [1989] 1 All ER 351, CA.

5 *Liverpool City Council v Irwin* [1977] AC 239, [1976] 2 All ER 39, HL.

6 le by the Landlord and Tenant Act 1985 s 11: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 416.

7 *Minchburn v Peck* (1988) 20 HLR 392, [1988] 1 EGLR 53, CA; *Loria v Hammer* [1989] EGLR 249. However, the landlord is in breach of a repairing covenant as soon as the defect occurs if this happens in part of the building not demised: *British Telecommunications plc v Sun Life Assurance Society plc* [1995] 4 All ER 44, [1995] WLR 622, CA. As to mitigation see PARA 1041 et seq ante.

8 *Lee-Parker v Izzet* [1971] 3 All ER 1099, [1971] 1 WLR 1688; and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 463.

9 *Melville v Grapelodge Developments Ltd* (1978) P & CR 179. Clear words are required to exclude any such right of set-off (*Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 4 All ER 834, [1994] 1 WLR 501, CA). As to damages in equity see PARA 1120 et seq post.

10 This was not always so: see *Hill v Barclay* (1810) 16 Ves 402 (lack of mutuality between landlord and tenant); but see now *Jeune v Queen's Cross Properties* [1974] Ch 97, [1973] 3 All ER 97. A tenant may now be ordered to carry out repairs in appropriate circumstances: see *Rainbow Estates v Tokenhold Ltd* [1998] 2 All ER 860, (1998) Times, 2 January (listed building). In the case of dwellings, there is jurisdiction to award specific performance of wide statutory repairing obligations: see the Landlord and Tenant Act 1985 s 17 (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 465). The court may appoint a manager in the case of residential flats if a landlord fails to carry out repairs: see the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 399 et seq. As to specific performance generally see SPECIFIC PERFORMANCE.

11 *Robinson v Harman* (1848) 1 Exch 850. As to the measure of damages in contract see PARA 941 et seq ante.

12 As to remoteness of damage see *Hadley v Baxendale* [1854] 9 Exch 341; and PARA 1015 et seq ante.

13 *Wallace v Manchester City Council* [1998] EGCS 114, CA.

14 The measure is subjective, in contrast to the damages recoverable by a landlord for breach of a tenant's repairing covenant: see PARA 1060 ante.

15 *Hewitt v Rowlands* (1924) 93 LJB 1080 at 1082, CA, per Bankes LJ; *Barnes v City London Real Property Co* [1918] 2 Ch 18 (breach of landlord's obligation to provide housekeeper; damages to be based upon comparative value of tenancy supplied with services and tenancy with no such services supplied).



16 Cf a landlord's common law right to the cost of repair at the determination of a lease even where the lack of repair makes no difference to the value of the reversion: see *Joyner v Weeks* [1891] 2 QB 31, CA; and PARA 1060 ante.

17 Ie the Landlord and Tenant Act 1927 s 18(1) has no application: see PARA 1060 ante; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 459-460.

18 See the Leasehold Property (Repairs) Act 1938 (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 463); and PARA 1060 ante.

19 As to the distinction between a covenant to repair and a covenant to put in repair see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 413 et seq.

20 *Coward v Gregory* (1866) LR 2 CP 153 (damages reduced on account of earlier award). As to prospective damages see PARAS 810, 834 ante.

21 *Calabar Properties v Stitcher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA (the leading modern case on heads of damage for a tenant's breach of a repairing covenant). As to a landlord's claim for breach of a tenant's covenant to repair see PARA 1060 ante.

22 This is a reasonable time after the landlord has notice of the defect within the demised premises or when the defect occurs in the case of the defect occurring in part of the premises not demised: *British Telecommunications plc v Sun Life Assurance Society plc* [1995] 4 All ER 44, [1995] WLR 622, CA. See further LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 463.

23 Ie by virtue of RSC Ord 37 r 6. Prospective damages are not recoverable: see the text to note 20 supra; and PARAS 810, 834 ante.

24 As to the reasonableness of repairs see *Ruxley Electronics and Constructions v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL (cost of cure unreasonable but damages awarded for loss of satisfaction).

25 *Calabar Properties v Stitcher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA.

26 *Sturolson v Co v Mauroux* [1988] 1 EGLR 66, 20 HLR 332, CA.

27 *Calabar Properties v Stitcher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA.

28 *Wallace v Manchester City Council* [1998] EGCS 114, CA. See also *McCoy & Co v Clark* (1982) 13 HLR 87, CA; *Calabar Properties v Stitcher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA; *Chiodi v de Marney* (1988) 21 HLR 6, [1988] 2 EGLR 64, CA.

29 *Wallace v Manchester City Council* [1998] EGCS 114, CA.

30 *Wallace v Manchester City Council* [1998] EGCS 114, CA (in respect of periods occurring after such sale of sub-lease the tenant could not recover damages for loss of comfort and convenience resulting from living in the property). See also *Calabar Properties v Stitcher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA.

31 See *Wallace v Manchester City Council* [1998] EGCS 114, CA; *McCoy & Co v Clark* (1982) 13 HLR 87, CA.

32 See *Wallace v Manchester City Council* [1998] EGCS 114, CA; *Calabar Properties v Stitcher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA; *Chiodi v de Marney* (1988) 21 HLR 6, [1988] 2 EGLR 64, CA.

33 See *Sturolson & Co v Mauroux* [1988] 1 EGLR 66, 20 HLR 332, CA; *Brent London Borough Council v Carmel* (1995) 28 HLR 203, CA.

34 *Green v Eales* (1841) 2 QB 225; see comments thereon in *Calabar Properties v Stitcher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA.

35 *Loria v Hammer* [1989] 2 EGLR 249.

36 *Calabar Properties v Stitcher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA; *Chiodi v de Marney* (1988) 21 HLR 6, [1988] 2 EGLR 64, CA. Damages for mental distress are exceptional in contract and, unless the contract is one for the provision of pleasure or for the relief of stress or anxiety, distress needs to be directly related to physical inconvenience in order for damages in respect of it to be recoverable: *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 1421, CA (the leading case on the restrictions on damages for mental distress). Such damages are not recoverable for breach of a covenant for quiet enjoyment: *Branchett v Beaney, Branchett v Swale Borough Council* [1992] 3 All ER 910, 24 HLR 348, CA; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 519. As to damages for distress and loss of enjoyment see PARA 957 et seq ante.

37 *Calabar Properties v Stitcher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA, explaining remarks to the contrary in *Green v Eales* (1841) 2 QB 225. See also *Hewitt v Rowlands* (1924) 93 LJB 1080, CA; *Sturrolson & Co v Mauroux* [1988] 1 EGLR 66, 20 HLR 332, CA; *Chiodi v de Marney* (1988) 21 HLR 6, [1988] 2 EGLR 64, CA.

38 *McGreal v Wake* (1984) 13 HLR 107, 269 EG 1254, CA.

39 *Calabar Properties v Stitcher* [1983] 3 AER 759, [1984] 1 WLR 287, CA; *Bradley v Chorley Borough Council* (1985) 17 HLR 305, [1985] 2 EGLR 49, CA.

40 *Marshall v Rubypoint Ltd* [1997] 1 EGLR 69, [1997] EG 142, CA.

41 *Calabar Properties v Stitcher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA; *Mira v Aylmer Square Investments* [1990] 1 EGLR 45, 21 HLR 284, CA.

42 *Griffin v Pillet* [1926] 1 KB 17; *Porter v Jones* [1942] 2 All ER 570, CA. As to damages for personal injury see PARA 878 et seq ante.

43 *Hewitt v Rowlands* (1924) 93 LJB 1080, CA.

## **UPDATE**

### **1061 Landlord's repairing covenant**

TEXT AND NOTE 23--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(3) CONTRACT: PARTICULAR TRANSACTIONS/1062. Employment; wrongful dismissal.

### **1062. Employment; wrongful dismissal.**

The basic measure of damages for wrongful dismissal is the earnings and other benefits to which the employee would have been entitled if the employment had been terminated in accordance with the contract<sup>1</sup>. If the employee has been dismissed without any warning, disciplinary or dismissal procedures prescribed by the contract of employment having been followed by the employer<sup>2</sup>, the employee is entitled to damages equivalent to his net salary for the period which it would have taken for the required procedures to have been observed, together with any contractual period of notice<sup>3</sup>.

A wrongfully dismissed employee is not entitled to damages for injury to feelings stemming from the manner of his dismissal or for the very fact that his having being dismissed renders it more difficult for him to find further employment<sup>4</sup>, unless there has thereby been a breach of an implied term of trust and confidence<sup>5</sup>. A dismissed employee can, however, obtain damages for loss of an opportunity to enhance an existing reputation, for example in the case of an actor or other professional<sup>6</sup>, and in an action for breach of an implied term of trust and confidence, compensation can be awarded for damage to an existing reputation where this involves financial loss<sup>7</sup>. The measure of compensation for the statutory wrong of unfair dismissal<sup>8</sup> does not affect the common law cause of action of wrongful dismissal<sup>9</sup>.

The employee is under a duty to mitigate his loss by taking other employment which is suitable and available<sup>10</sup>. The obligation is not onerous. However, other deductions stand to be made from any damages award. The tax that the dismissed employee would have paid is deducted<sup>11</sup>, though not to be paid over by the employer to the Inland Revenue, but damages in excess of a certain sum are themselves taxable in the hands of the former employee<sup>12</sup>. Certain benefits are also deducted from damages awarded for loss of earnings<sup>13</sup>, but payment from private pensions and insurance schemes are not<sup>14</sup>. Redundancy payments are deductible<sup>15</sup>. A compensatory award for unfair dismissal is not deductible from damages awarded for wrongful dismissal, unless double recovery is involved<sup>16</sup>.

1 *Beckham v Drake* (1849) 2 HL Cas 579 per Erle J advising their lordships. As the text indicates, damages are based upon contractual entitlement and not on what the employee would have received: *Lavarack v Woods Ltd* [1967] 1 QB 278, [1966] 3 All ER 683, CA (no entitlement to bonuses); *Beach v Reed Corrugated Cases* [1956] 2 All ER 652, [1956] 1 WLR 807 (no entitlement to pension); *Bold v Brough Nicholson and Hall* [1963] 3 All ER 849, [1964] WLR 201 (individual contractual entitlement to pension scheme although employer had right to discontinue the scheme generally). An employer is obliged to provide only that performance which is least beneficial to the employee. As to loss of a chance see PARA 962 et seq ante. See further EMPLOYMENT vol 40 (2009) PARA 785.

2 Cf *Janciuk v Winerite* [1998] IRLR 63, EAT.

3 *Gunton v Richmond London Borough Council* [1980] ICR 755, [1980] IRLR 321, CA; *Dietman v Brent London Borough Council* [1988] ICR 842, [1988] IRLR 299, CA; *Boyo v Lambeth London Borough Council* [1994] ICR 727, [1995] IRLR 50, CA; *Focsa Services (UK) Ltd v Birkett* [1996] IRLR 325, EAT. These cases (and *Marsh v National Autistic Society* [1993] ICR 453) show that even where the contract can be said to be still subsisting, eg where a repudiatory breach has not been accepted by the employee, the employee's remedy still sounds in damages and not debt, where there would be no requirement to mitigate. As to mitigation see the text and note 10 infra; and PARA 1041 et seq ante.

4 *Addis v Gramophone Co Ltd* [1909] AC 48, HL; *O'Laoire v Jackel International (No 2)* [1991] ICR 718, [1991] IRLR 170, CA. Cf the remarks on *Addis v Gramophone Co Ltd* supra in *Ruxley Electronics v Forsyth* [1996] AC 344 at 374, [1995] 3 All ER 268 at 289, HL, per Lord Lloyd of Berwick.

5 *Malik v Bank of Credit and Commerce International SA* [1997] 3 All ER 1, sub nom *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20, HL.

6 *Marb  v George Edwardes* [1928] 1 KB 269, CA; *Withers v General Theatre Corpn* [1933] 2 KB 536, CA.

7 *Malik v Bank of Credit and Commerce International SA* [1997] 3 All ER 1, sub nom *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20, HL (not a wrongful dismissal case), overruling *Withers v General Theatre Corpn* [1933] 2 KB 536, CA, on this point.

8 le under the Employment Rights Act 1996 Pt X (ss 94-134) (as amended): see EMPLOYMENT vol 40 (2009) PARA 714 et seq.

9 *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1973] 1 WLR 45. As to wrongful dismissal see EMPLOYMENT vol 40 (2009) PARA 780 et seq.

10 *Beckham v Drake* (1849) 2 HL Cas 579 at 606-607 per Erle J. See further EMPLOYMENT vol 40 (2009) PARAS 785-786. As to the duty to mitigate see PARA 1041 ante.

11 *Beach v Reed Corrugated Cases* [1956] 2 All ER 652, [1956] 1 WLR 807; *Shindler v Northern Raincoat Co* [1960] 2 All ER 239, [1960] 1 WLR 1038. See also EMPLOYMENT vol 40 (2009) PARA 786.

12 le damages in excess of  30,000: see the Income and Corporation Taxes Act 1988 ss 148, 188 (as amended); and INCOME TAXATION vol 23(1) (Reissue) PARA 691.

13 le benefits such as Income Support or Jobseeker's Allowance. See *Parsons v BNM Laboratories* [1964] 1 QB 95, [1963] 2 All ER 658, CA; *Westwood v Secretary of State for Employment* [1985] AC 20, [1984] 1 All ER 874, HL.

14 *Hopkins v Norcros* [1994] ICR 11, [1994] IRLR 18, CA.

15 *Colledge v Bass Mitchells & Butlers Ltd* [1988] 1 All ER 536, [1988] ICR 125, CA (a personal injury case). The law has been unsettled: cf *Mills v Hassell* [1983] ICR 330; *Wilson v National Coal Board* 1981 SLT 67, HL. See also EMPLOYMENT vol 40 (2009) PARA 786. The argument has proceeded by way of analogy with personal injury cases and whether or not a redundancy payment would have been payable in any event, apart from the wrongfulness of the dismissal. As to damages for personal injury see PARA 878 et seq ante.

16 *O'Laoire v Jackel International Ltd (No 2)* [1991] ICR 718, sub nom *O'Laoire v Jackel International Ltd* [1991] IRLR 170, CA.

## UPDATE

### 1062 Employment; wrongful dismissal

NOTE 12--Income and Corporation Taxes Act 1988 s 148 replaced by provisions of the Income Tax (Earnings and Pensions) Act 2003. For destination of replaced provision, see table, INCOME TAXATION vol 23(2) (Reissue) PARA 1900A.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(3) CONTRACT: PARTICULAR TRANSACTIONS/1063. Contract to pay or lend money.

### **1063. Contract to pay or lend money.**

Upon breach of a contract to pay money due, the amount recoverable is normally limited to the amount of the debt together with such interest from the time when it became payable under the contract<sup>1</sup> or by statute<sup>2</sup>, or as the court may allow<sup>3</sup>. This will be the measure of damages no matter what inconvenience the plaintiff has suffered from the failure to pay on the day payment was due<sup>4</sup>.

The reason for the rule is, it seems, that any further damage is too remote a consequence of the non-payment because it is not within the contemplation of the parties; where the circumstances are such that a special loss is foreseeable at the time of the contract as a consequence of non-payment or unpunctual payment, damages may be recoverable for that loss<sup>5</sup>.

Damages for breach of a contract to lend money may be nominal or substantial according to the circumstances which will in each case determine the reasonable contemplation as to the loss which is liable to result from the breach<sup>6</sup>. Thus the cost of raising the money elsewhere may be recoverable as a natural result<sup>7</sup>, and where the defendant had knowledge of other probable consequences of his breach he may have to render full compensation for the loss thereby inflicted upon the plaintiff<sup>8</sup>. Whether the damages claimed are damages arising naturally from the breach or damages for which the contract breaker is liable because of his special knowledge at the time of the contract<sup>9</sup> depends also on all the circumstances of the case<sup>10</sup>.

1 *Hamlin v Great Northern Rly Co* (1856) 1 H & N 408 at 411 per Pollock CB; *Schlesinger and Joseph v Mostyn* [1932] 1 KB 349 (recovery from settlor of insurance premiums paid by settlement trustees on breach of contract by settlor to pay them). Liability to pay interest may be implied from the course of business or the custom of the trade: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1305.

2 As to damages for dishonour of a bill of exchange see the Bills of Exchange Act 1882 s 57 (codifying the law merchant); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1601-1602.

3 Where the debt does not carry interest as of right, by agreement or otherwise, a court of record has a discretion to award interest at such rate upon such part of the debt and for such period between the date when the cause of action arose and judgment as it thinks fit: see the Law Reform (Miscellaneous Provisions) Act 1934 s 3(1); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1307. For interest on an arbitrator's award see the Arbitration Act 1996 s 49; and ARBITRATION vol 2 (2008) PARA 1260. As to interest on judgment debts see CIVIL PROCEDURE.

4 *Fletcher v Tayleur* (1855) 17 CB 21 at 29; cf *Wallis v Smith* (1882) 21 ChD 243 at 257, CA, where Jessel MR considered the rule unreasonable. As to the power to award interest at common law see *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1893] AC 429, HL; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1305.

5 *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 at 306, [1952] 1 All ER 970 at 975, CA, per Denning LJ, and at 307 and 978 per Romer LJ; and see per McNair J in the court of first instance [1952] 1 KB 285 at 288, [1952] 1 All ER 89 at 91. Dicta to the contrary in *British Columbia Saw-Mills Ltd v Nettleship* (1868) LR 3 CP 499 at 509 per Willes J, would appear to be inconsistent with later decisions and incorrect: see *Monarch Steamship Co Ltd v Karlshamns Oljefabriker AB* [1949] AC 196, [1949] 1 All ER 1, HL; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA.

6 In the light of the cases cited in note 5 supra, it may be doubted whether there remains any distinction in principle as regards the measure of damages for non-payment of a money debt and breach of contract to lend money or to accept bills. The distinction was recognised in *Prehn v Royal Bank of Liverpool* (1870) LR 5 Exch 92, where, however, the court found that there was a special contract to accept the plaintiff's bills and that

damages for non-acceptance were therefore not limited to the amount of the bills and interest: see *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA.

7 *Prehn v Royal Bank of Liverpool* (1870) LR 5 Exch 92; *Astor Properties Ltd v Tunbridge Wells Friendly Society* [1936] 1 All ER 531 (commission payable to other financiers recoverable). Commissions payable for a temporary as well as a permanent loan, however, will not always be allowed: see *Astor Properties Ltd v Tunbridge Wells Friendly Society* *supra* at 534 per Hawke J.

8 *Manchester and Oldham Bank Ltd v WA Cook & Co* (1883) 49 LT 674 (express notice of plaintiff's situation); *South African Territories v Wallington* [1898] AC 309, HL; *Wallis Chlorine Syndicate Ltd v American Alkali Co Ltd* (1901) 17 TLR 656. Damages for breach of contract to make a loan may be nominal: see *Western Waggon and Property Co v West* [1892] 1 Ch 271 at 277 per Chitty J. Damages may include loss of business profits where such loss was within the parties' contemplation: see *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA (defendants' failure in breach of contract to open a confirmed credit to finance a transaction which the plaintiffs could not otherwise undertake).

9 See PARA 1025 *ante*.

10 See *Monarch Steamship Co Ltd v Karlshamns Oljefabriker AB* [1949] AC 196 at 220, 225, [1949] 1 All ER 1 at 10, 15, HL, per Lord Wright (provision of an unseaworthy ship resulted in shipping delays and war then broke out and made necessary the transshipment of the cargo; the cost of transshipment was recovered as arising naturally from the unseaworthiness). Some fine distinctions have been drawn in the cases of breach of contract to accept drafts as to what arises naturally from the breach and what is a result of special circumstances known to the parties: see *Prehn v Royal Bank of Liverpool* (1870) LR 5 Exch 92; cf *Boyd v Fitt* (1862) 14 ICLR 43; *Larios v Bonany y Gurety* (1873) LR 5 PC 346. A claim for consequential damage, however, should always be pleaded fully. As to the pleading of damage see PARA 1145 *et seq post*.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(3) CONTRACT: PARTICULAR TRANSACTIONS/1064. Non-delivery or non-acceptance, and loan or deposit, of shares.

#### **1064. Non-delivery or non-acceptance, and loan or deposit, of shares.**

The following principles govern the measure of damages in the case of non-delivery or non-acceptance of shares, or the loan or deposit of shares.

In an action for the non-delivery of shares the measure of damages is the difference between the contract price and the market price at the date of breach<sup>1</sup>. If a buyer of shares declines to take them up the measure of damages will be the same. Should the seller of the shares at a date after the date of the breach of contract sell the shares on a rising market the measure of damages will not be affected by that sale, the seller's right being to recover damages based on the best price at the date of the breach<sup>2</sup>. In an action for withholding shares after tender of the sum due for calls and interest the damages naturally resulting are the value of the shares at the market price on the day of tender, deducting the amount of calls and interest<sup>3</sup>. If the shares fail to meet a warranty of quality, the damages are prima facie the difference between what the shares would have been worth if the earnings had been in accordance with the warranty and what they were actually worth<sup>4</sup>. Damages may be awarded in addition to a decree of specific performance<sup>5</sup> on breach of a contract to allot shares, but in such a case where the decree is complied with the position of the aggrieved party is fully restored by an award of damages equivalent to the dividends he would have received if the contract had been duly performed together with interest on the dividends until payment<sup>6</sup>.

Where there has been a loan or deposit of stock or shares and they have not been replaced, the measure of damages is the value of the stock or shares on the day when replacement was due or, at the plaintiff's option, the market price at the date of trial<sup>7</sup>. Thus if the value has risen by the date of trial the value at that date is to be taken<sup>8</sup>, and if the value has fallen at the date of the trial, the value should be estimated at the date when the stock or shares ought to have been replaced<sup>9</sup> or, if no date was fixed for their replacement, it seems, at the date of the loan<sup>10</sup>. The value, however, cannot be estimated at the highest price which the stock and shares have reached between the date of the loan and that of the trial<sup>11</sup>, and where on a rising market the defendant after default has offered to replace the stock or shares the measure of damages is the value of the stock or shares at the time of the offer, and not their increased value at the time of trial<sup>12</sup>.

1 'The plaintiff has his money in his own possession and might have gone into the market and bought other shares as soon as the contract was broken': *Shaw v Holland* (1846) 15 M & W 136 per Parke B; cf *Gainsford v Carroll* (1824) 2 B & C 624 (non-delivery of goods). See also *Powell v Jessopp* (1856) 18 CB 336; *Michael v Hart & Co* [1902] 1 KB 482, CA; *Manchester and Oldham Bank v Cook* (1883) 49 LT 674. The difference is more properly that between the contract price and the market price on the day after the breach, where the defendant has the whole of the day fixed for delivery on which to deliver (*Shaw v Holland* supra), but effect must be given to the express or implied terms of the contract. See further *Ronnoc Finance Ltd v Spectrum Network Systems* (5 November 1997, unreported), NSW SC, per Santow J; noted at (1998) 72 ALJ 191.

2 *Jamal v Moolla Dawood, Sons & Co* [1916] 1 AC 175, PC; *Keck v Faber, Jellett and Keeble* (1915) 60 Sol Jo 253. The reason is because the seller is not under any obligation to sell, and if he does not he takes his own chance of profit or loss when the market rises or falls: see *Jamal v Moolla Dawood Sons & Co* supra at 179 per Lord Wrenbury; cf *Campbell Mostyn (Provisions) Ltd v Barnett Trading Co* [1954] 1 Lloyd's Rep 65, CA (non-acceptance of goods). See further *Pott v Flather* (1847) 16 LJB 366; *Stewart v Cauty* (1841) 8 M & W 160.

3 *Van Dieman's Land Co v Cockerell* (1857) 1 CBNS 732, Ex Ch. See also *Wilson v London and Globe Finance Corp* (1897) 14 TLR 15, CA (buyer at seller's request abstained from taking initial action for non-delivery).

4 *Lion Nathan Ltd v CC Bottlers Ltd* [1996] 1 WLR 1438 at 1441, (1996) Times, 16 May, PC (prima facie measure not applied because the warranty given was that reasonable care would be taken in the preparation of a forecast rather than a warranty of quality; damages assessed on the difference between the price agreed on the assumption of the forecast earnings and what the price would have been if a proper forecast had been made). See further *Re Government Security Fire Insurance, (Mudford's Claim)* (1880) 14 ChD 634 (contract for fully paid up shares, not fully paid up shares delivered: Hall VC at 638 said damages would have to be ascertained 'as to each of the three allotments by the market value thereof at the time when the certificates were received by Mr Mudford, had there been a market for such shares; but there not having been such a market, the Court must fix the proper compensation to be made: which, considering that shares were taken by the public subsequently to the allotments, I assess at the amount of the calls made, or which will be made upon the shares').

5 If there is a free market in the shares damages will be an adequate remedy without specific performance: see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 826.

6 *Sri Lanka Omnibus Co Ltd v Perera* [1952] AC 76 at 81, [1951] 2 TLR 1184 at 1187, PC. As to the payment of dividends generally see COMPANIES vol 15 (2009) PARA 1408 et seq.

7 *Harrison v Harrison* (1824) 1 C & P 412; *Shepherd v Johnson* (1802) 2 East 211; *M'Arthur v Lord Seaforth* (1810) 2 Taunt 257.

8 *Shepherd v Johnson* (1802) 2 East 211; *Owen v Routh* (1854) 14 CB 327 (the value had risen).

9 *Sanders v Kentish* (1799) 8 Term Rep 162; cf *Ellis & Co's Trustee v Dixon-Johnson* [1925] AC 489, HL.

10 *Forrest v Elwes* (1799) 4 Ves 492.

11 *M'Arthur v Lord Seaforth* (1810) 2 Taunt 257; *Simmons v London Joint Stock Bank* [1891] 1 Ch 270 at 284, CA, per Kekewich J (revsd on other grounds sub nom *London Joint Stock Bank v Simmons* [1892] AC 201, HL). It is not to be assumed that the plaintiff would necessarily have sold at such a value and that the loss of such a speculative increase in value is the natural or probable result of the breach of contract. The position may be different in tort: see *Archer v Williams* (1846) 2 Car & Kir 26, where the action was in detinue for scrip and the market value of the scrip had diminished, and it was suggested that the plaintiff was entitled to the highest value of the scrip between the date of the detention and the date of trial. Cf *Michael v Hart & Co* [1902] 1 KB 482, CA (affd sub nom *Hart & Co v Michael* (1903) 89 LT 422, HL) (anticipatory breach of special contract made with stockbrokers); *Solloway v McLaughlin* [1938] AC 247, [1937] 4 All ER 328, PC (conversion by stockbroker). Where share certificates are irretrievably or irreversibly converted, and thereafter fall in value, the measure of damages awardable against the converter is the value at the date of conversion: *BBMB Finance (Hong Kong) v Eda Holdings* [1991] 2 All ER 129, [1990] 1 WLR 409, PC; cf *IBL Ltd v Coussens* [1991] 2 All ER 133, (1990) Financial Times, 4 July, CA. Where the plaintiff can show that he would have sold at a given time this may provide a measure, or an average may be taken: *Williams v Peel River Land and Mineral Co Ltd* (1886) 55 LT 689, CA.

12 *Shepherd v Johnson* (1802) 2 East 211 at 212 obiter per Grose J.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1065. Liquidated damages distinguished from penalties.

#### **(4) CONSENSUAL ADJUSTMENT OF DAMAGES**

##### **1065. Liquidated damages distinguished from penalties.**

The parties to a contract may agree at the time of contracting that, in the event of a breach, the party in default shall pay a stipulated sum of money to the other<sup>1</sup>. If this sum is a genuine pre-estimate of the loss which is likely to flow from the breach<sup>2</sup>, then it represents the agreed damages, called 'liquidated damages'<sup>3</sup>, and it is recoverable without the necessity of proving the actual loss suffered<sup>4</sup>. If, however, the stipulated sum is not a genuine pre-estimate of the loss but is in the nature of a penalty intended to secure performance of the contract, then it is not recoverable<sup>5</sup>, and the plaintiff must prove what damages he can<sup>6</sup>. The operation of the rule against penalties does not depend on the discretion of the court<sup>7</sup>, or on improper conduct, or on circumstances of disadvantage or ascendancy, or on the general character or relationship of the parties<sup>8</sup>. The rule is one of public policy and appears to be *sui generis*<sup>9</sup>. Its absolute nature inclines the courts to invoke the jurisdiction sparingly<sup>10</sup>. The burden of proving that a payment obligation is penal rests on the party who is sued on the obligation<sup>11</sup>.

1 A related situation arises where the parties agree that in the event of a breach the party in default will forfeit a sum already paid to the other: see *Stockloser v Johnson*[1954] 1 QB 476, [1954] 1 All ER 630, CA; *Galbraith v Mitchenall Estates Ltd*[1965] 2 QB 473, [1964] 2 All ER 653. In *Stockloser v Johnson* supra, the Court was divided as to whether a court has jurisdiction to relieve against the forfeiture of all purchase instalments made by a buyer who has been let into possession of the property on breach by the buyer, where the contract additionally provides for repossession of the property by the seller in those circumstances, if the term in question imposes a loss on the buyer which is excessive in proportion to the seller's loss. No decision was taken as to whether the court could order repayment of the paid instalments. Denning LJ and Somervell LJ believed that the court had jurisdiction to relieve the buyer in appropriate circumstances, whereas Romer LJ thought otherwise. In *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd*[1993] AC 573 at 581-582, [1993] 2 All ER 370 at 375-376, PC, the Judicial Committee of the Privy Council left this question open.

2 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[1915] AC 79, HL; *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda*[1905] AC 6, HL (where the words 'genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation' (see at 19 per Lord Robertson) were adopted from the judgment of Lord Kyllachy in the court below (1903 5 F 1016, Ct of Sess); *Public Works Comr v Hills*[1906] AC 368, PC; *Bridge v Campbell Discount Ltd*[1962] AC 600, [1962] 1 All ER 385, HL; *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128, [1966] 1 WLR 1428, CA; *Export Credits Guarantee Department v Universal Oil Products Co*[1983] 2 All ER 205, [1983] 1 WLR 399, HL; *Ariston SRL v Charly Records Ltd* (1990) Financial Times, 21 March, (1990) The Independent, 13 April, CA; *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41, (1993) Times, 15 February, PC; *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA.

3 As to liquidated damages see PARA 1066 post. It is open to the parties to agree a sum for damages which is less than the probable loss: see *Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd*[1933] AC 20, HL; *Suisse Atlantique Société d'Armement Maritime SA v Rotterdamsche Kolen Centrale*[1967] 1 AC 361, [1966] 2 All ER 61, HL.

4 *Kemble v Farren* (1829) 6 Bing 141 at 148, per Tindal CJ; *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[1915] AC 79 at 97, HL, per Lord Parker.

5 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[1915] AC 79, HL; *Photo Production Ltd v Securicor Transport Ltd*[1980] AC 827 at 850, [1980] 1 All ER 556 at 567, HL, per Lord Diplock. The refusal to sanction legal proceedings for penalties is in fact a rule of the court's own, produced and maintained for purposes of public policy (except where imposed by positive statutory enactment): *Bridge v Campbell Discount Co Ltd*[1962] AC 600 at 622, [1962] 1 All ER 385 at 395, HL, per Lord Radcliffe.

In certain cases involving contracts for the sale or supply of goods or the supply of services between a party acting for the purposes of his business and a consumer, contract terms of the type under discussion may not be binding on the consumer by reason of the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159: see reg 5(1), Sch 3(1)(e) (terms which have the object or effect of requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation); and CONTRACT vol 9(1) (Reissue) PARA 795.

6 As to the limited enforceability of the penalty clause itself see PARA 1067 post. It is said that penalty clauses are, in effect, exclusion of damages clauses in reverse: *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128, [1966] 1 WLR 1428, CA. See also CONTRACT vol 9(1) (Reissue) PARA 797 et seq.

7 Cf the equitable jurisdiction to grant relief against forfeiture: see PARA 1076 post; and EQUITY vol 16(2) (Reissue) PARA 804.

8 *Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA; *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41, (1993) Times, 15 February, PC.

9 *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128, [1966] 1 WLR 1428, CA.

10 *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41, PC.

11 *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128, [1966] 1 WLR 1428, CA.

## UPDATE

### 1065 Liquidated damages distinguished from penalties

NOTE 5--SI 1994/3159 reg 5(1), Sch 3(1)(e) now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 8(1), Sch 2(1)(e). See also *Lansat Shipping Co Ltd v Glencore Grain BV, The Paragon* [2009] EWCA Civ 855, [2010] 1 All ER (Comm) 459 (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 253).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1066. Rules for distinguishing between damages and penalties.

### **1066. Rules for distinguishing between damages and penalties.**

In distinguishing between liquidated damages and penalties, the essential question for the court is whether the stipulated sum is a genuine pre-estimate of the loss which is likely to flow from the breach<sup>1</sup>. Guidance can be obtained from the following rules:

- 81 (1) although parties to a contract who use the words 'liquidated damages' or 'penalty' may be supposed prima facie to mean what they say<sup>2</sup> the expression used is not conclusive. The court must determine whether the payment stipulated is in truth a penalty or liquidated damages<sup>3</sup>. The intention of the parties themselves, and the literal language of the contract, may be disregarded (however clearly expressed) if the court considers that the expression of these matters does not represent the real nature of the transaction or what in truth it is to be taken to be<sup>4</sup>;
- 82 (2) the question whether a sum stipulated is liquidated damages or a penalty is a question of construction and of law<sup>5</sup> to be decided upon the terms and inherent circumstances of each particular contract, judged as at the time of the making of the contract, not as at the time of the breach<sup>6</sup>. Accordingly, a clause which has been held to stipulate for liquidated damages in one case may in the circumstances of another be found to stipulate for a penalty<sup>7</sup>. The mere difficulty in assessing damages which would ordinarily, and in the absence of the clause, be payable, far from supporting characterisation as a penalty, will generally incline the court to uphold the clause where it seeks to clarify the uncertainty as to damages and define the recoverable loss<sup>8</sup>;
- 83 (3) the payment will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably<sup>9</sup> be proved to have followed from the breach<sup>10</sup>;
- 84 (4) the payment will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid<sup>11</sup>. Cases of this kind, however, must be differentiated from those in which, for example, it is agreed to charge a certain rate of interest on condition that if the payment is made punctually a lesser rate will be accepted<sup>12</sup>. Similarly, where a sum of money is to be paid by instalments subject to a stipulation that in the event of one instalment falling in arrear the whole sum is to become immediately payable, the court will not, on this ground alone, relieve against the stipulation on the ground that it is in the nature of a penalty<sup>13</sup>;
- 85 (5) there is a presumption (but no more) that it is a penalty when a single lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage<sup>14</sup>. This is because the stipulated sum will probably be extravagant and unconscionable in comparison with the greatest loss likely to flow from the event causing trifling damage. In short the strength of the chain must be taken at its weakest link<sup>15</sup>; and
- 86 (6) the fact that the consequences of the breach are such as to make precise pre-estimation almost an impossibility is no obstacle to the stipulated sum being a genuine pre-estimate. On the contrary, this is just the situation when it is probable that pre-estimated damage was the true bargain between the parties<sup>16</sup>.

1 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, HL; *Bridge v Campbell Discount Co Ltd* [1962] AC 600, [1962] 1 All ER 385, HL; *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128, [1966] 1 WLR 1428, CA; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556, HL; *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205, [1983] 1 WLR 399, HL; *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41, (1993) Times, 15 February, PC; *Ariston SRL v Charly Records Ltd* (1990) Financial Times, 21 March, (1990) The Independent 13 April, CA; *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA. As to actual or recoverable loss see PARA 1071 post. Where, instead of a stipulated sum, there is a sliding scale of compensation this scale will not be a genuine pre-estimate of damage if it slides in the wrong direction, as by decreasing when the loss is in fact increasing. This was the case in *Bridge v Campbell Discount Co Ltd* supra (minimum payment clause in a hire purchase agreement). See also *Anglo-Auto Finance Co Ltd v James* [1963] 3 All ER 566, [1963] 1 WLR 1042, CA; *EP Finance Co Ltd v Dooley* [1964] 1 All ER 527, [1963] 1 WLR 1313; *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 QB 54, [1967] 2 All ER 345, CA; *Wadham Stringer Finance v Meaney* [1980] 3 All ER 789, [1981] 1 WLR 39; *Lombard North Central plc v Butterworth* [1987] QB 527, [1987] 1 All ER 267, CA. In *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL, a term in a building sub-contract reading 'If the sub-contractor fails to comply with any of the conditions of this sub-contract the contractor reserves the right to suspend or withhold payment of any monies due or becoming due to the sub-contractor' was held to impose a penalty since it purported to allow the contractor to suspend or withhold payment of any money due or becoming due to the sub-contractor, however large, if the sub-contractor was guilty of any breach of the sub-contract, however minor.

2 *Alder v Moore* [1961] 2 QB 57 at 69, [1961] 1 All ER 1 at 7, CA, per Devlin LJ (dissenting but not on this point), where the parties' use of the word 'penalty' placed the onus on payees to disprove penal nature.

3 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 86, HL, per Lord Dunedin; *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6 at 9, HL, per Lord Halsbury LC; *Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd* [1933] AC 20 at 25, HL, per Lord Atkin. See also *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128, [1966] 1 WLR 1428, CA; *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205, [1983] 1 WLR 399, HL; *Ariston SRL v Charly Records Ltd* (1990) Financial Times, 21 March, (1990) The Independent 13 April, CA; *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41, (1993) Times, 15 February, PC. See further *Green v Price* (1845) 13 M & W 695 at 701 per Parke B (affd sub nom *Price v Green* (1847) 16 M & W 346, Ex Ch); *Saintier v Ferguson* (1849) 7 CB 716; *Coles v Sims* (1854) 23 LJ Ch 258; *Betts v Burch* (1859) 4 H & N 506 at 511 per Bramwell B; *Sparrow v Paris* (1862) 7 H & N 594; *Thompson v Hudson* (1869) LR 4 HL 1 at 30 per Lord Westbury; *Magee v Lavell* (1874) LR 9 CP 107; *Re Newman ex p Capper* (1876) 4 ChD 724 at 731; *Lord Elphinstone v Monkland Iron and Coal Co* (1886) 11 App Cas 332, HL; *Re White and Arthur* (1901) 84 LT 594; *Pye v British Automobile Commercial Syndicate Ltd* [1906] 1 KB 425 at 430 per Bigham J; *Webster v Bosanquet* [1912] AC 394, PC; *Imperial Tobacco Co v Parsley* [1936] 2 All ER 515, 52 TLR 585, CA; *Alder v Moore* [1961] 2 QB 57, [1961] 1 All ER 1, CA; *Robert Stewart & Sons Ltd v Carapanayoti & Co Ltd* [1962] 1 All ER 418, [1962] 1 WLR 34. The terminology used may, however, affect the burden of proof: see *Robophone Facilities Ltd v Blank* supra at 142 and 1447 per Diplock LJ (where the expression 'liquidated damages' was used and it was held that the onus of showing that such a stipulation is a 'penalty clause' lies upon the party who is sued upon it); *Willson v Love* [1896] 1 QB 626 at 630, CA, per Lord Esher (where the parties themselves call the sum made payable a 'penalty' the onus lies on those who seek to show that it is to be payable as liquidated damages). Cf *Alder v Moore* [1961] 2 QB 57, [1961] 1 All ER 1, CA; *Crisdee v Bolton* (1827) 3 C & P 240 at 243; *Barton v Glover* (1815) Holt NP 43.

4 *Bridge v Campbell Discount Co Ltd* [1962] AC 600 at 622, [1962] 1 All ER 385 at 395, HL, per Lord Radcliffe; *Ariston SRL v Charly Records Ltd* (1990) Financial Times, 21 March, (1990) The Independent 13 April, CA (express designation of clause as 'penalty' not conclusive as to status, though on present facts clause was in fact penal). See also *Re White and Arthur* (1901) 84 LT 594, 17 TLR 461; *Diestal v Stevenson* [1906] 2 KB 345. Many nineteenth century cases emphasised the importance of ascertaining the intention of the parties as evidenced by their language; these are now to be read with caution. See eg *Boys v Ancell* (1839) 5 Bing NC 390; *Reynolds v Bridge* (1856) 6 E & B 528; *Dimech v Corlett* (1858) 12 Moo PCC 199; *Hinton v Sparkes* (1868) LR 3 CP 161; *Lea v Whitaker* (1872) LR 8 CP 70; *National Provincial Bank of England v Marshall* (1888) 40 ChD 112, CA.

5 *Saintier v Ferguson* (1849) 7 CB 716; *Magee v Lavell* (1874) LR 9 CP 107; *Willson v Love* [1896] 1 QB 626 at 629, CA, per Lord Esher MR.

6 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 86, HL, per Lord Dunedin; *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41 at 56, (1993) Times, 15 February, PC; *Public Works Comr v Hills* [1906] AC 368, PC; *Pye v British Automobile Commercial Syndicate Ltd* [1906] 1 KB 425 at 430 per Bigham J; *Webster v Bosanquet* [1912] AC 394, PC.

7 *Lombank Ltd v Excell* [1964] 1 QB 415, [1963] 3 All ER 486, CA (where a clause was held to be a penalty clause even though a similarly worded clause in *Phonographic Equipment (1958) Ltd v Muslu* [1961] 3 All ER

626, [1961] 1 WLR 1379, CA, had been held to stipulate for liquidated damages); *Lombank Ltd v Kennedy and Whitelaw* [1961] NI 192.

8 *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6, HL; *Robert Stewart & Sons Ltd v Carapanayoti* [1962] 1 All ER 418, [1962] 1 WLR 34; *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41, (1993) Times, 15 February, PC.

9 Fanciful, remote and improbable contingencies are not helpful in identifying a penalty: see *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41, (1993) Times, 15 February, PC; and PARA 1068 post.

10 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 87, HL, per Lord Dunedin; *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6 at 10, HL, per Lord Halsbury LC; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 850, [1980] 1 All ER 556 at 567, HL, per Lord Diplock ('a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation'). In *Cooden Engineering Co Ltd v Stanford* [1953] 1 QB 86, [1952] 2 All ER 915, CA, although the sum claimed, pursuant to minimum payments clauses in a hire purchase agreement on a motor car, did not exceed the greatest loss that could possibly follow on the breach, it would exceed it in all except the exceptional case where the car had become valueless, and was held to be a penalty.

11 *Astley v Weldon* (1801) 2 Bos & P 346 at 354 per Chambre J; *Davies v Penton* (1827) 6 B & C 216; *Kemble v Farren* (1829) 6 Bing 141 at 148 per Tindal CJ; *Betts v Burch* (1859) 4 H & N 506; *Thompson v Hudson* (1869) LR 4 HL 1 at 15 per Lord Hatherley LC; *Re Newman, ex p Capper* (1876) 4 ChD 724; *Wallis v Smith* (1882) 21 ChD 243 at 256, CA, per Jessel MR; *Law v Redditch Local Board* [1892] 1 QB 127 at 130, CA, per Lord Esher MR; *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, HL. See further *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA.

12 See *Astley v Weldon* (1801) 2 Bos & P 346 at 352, per Heath J; *Thompson v Hudson* (1869) LR 4 HL 1; *Lord Ashtown v White* (1847) 11 ILR 400.

13 *Wallingford v Mutual Society* (1880) 5 App Cas 685, HL; *Protector Endowment Loan and Annuity Co v Grice* (1880) 5 QBD 592 at 596, CA, per Bramwell LJ; *Re O'B* [1917] 2 IR 354.

14 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 87, HL, per Lord Dunedin; *Lord Elphinstone v Monkland Iron and Coal Co* (1886) 11 App Cas 332 at 342, HL, per Lord Watson; *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6 at 15, HL, per Lord Davey; *Ariston SRL v Charly Records Ltd* (1990) Financial Times, 21 March, (1990) The Independent 13 April, CA. See also *Kemble v Farren* (1829) 6 Bing 141 at 148, per Tindal CJ; *Wallis v Smith* (1882) 21 ChD 243 at 256, CA, per Jessel MR; *Hope v Burns and Oates* (1885) 1 TLR 272; *Bradley v Walsh* (1903) 88 LT 737; *Ford Motor Co (England) Ltd v Armstrong* (1915) 31 TLR 267, CA; *Lock v Bell* [1931] 1 Ch 35. This presumption can be displaced by other considerations: *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* supra at 98-99 per Lord Parker, who suggested by way of example that the court would give effect to an agreement reciting that the parties had estimated the probable damage from a breach of one stipulation at from £5 to £15 and from a breach of another at from £2 to £12, and had settled on £8 as a reasonable sum to be paid on a breach of either.

15 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 89, HL. The weakness of that hypothetical link must be credible and not fanciful: *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41 at 56, (1993) Times, February 15, PC.

16 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 at 88, HL, per Lord Dunedin; *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6 at 11, HL, per Lord Halsbury LC; *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41 at 57, (1993) Times, 15 February, PC; *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at 142, [1966] 1 WLR 1428 at 1447, CA, per Diplock LJ; *Webster v Bosanquet* [1912] AC 394 at 398, PC.

## UPDATE

### 1066 Rules for distinguishing between damages and penalties

NOTE 1--See *BNP Paribas v Wockhardt EU Operations (Swiss) AG* [2009] EWHC 3116 (Comm), [2009] All ER (D) 76 (Dec) (agreement not penal in nature by requiring defaulting party, on termination following an event of default, to pay amounts already due but unpaid).



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1067. Exceptional nature, narrow bounds.

### **1067. Exceptional nature, narrow bounds.**

The rule against penalties is an exceptional jurisdiction<sup>1</sup> and a rare (possibly sui generis<sup>2</sup>) example of judicial interference with bargains<sup>3</sup>. Its invalidating effect does not depend on any undue disadvantage suffered by the contract breaker, or any improperly exercised ascendancy or pressure on the part of the payee<sup>4</sup>. Partly for these reasons, courts may be reluctant to discover that degree of disproportion between the payable sum and actual or recoverable loss<sup>5</sup> which would invalidate the stipulated payment<sup>6</sup>. In the absence of domination<sup>7</sup>, courts should beware of allowing the rule to subvert the autonomy of the parties<sup>8</sup>, or of turning it against those whom it is designed to protect, by making genuine estimates harder to enforce<sup>9</sup>. Conversely, the rule does not exist to relieve against onerous or imprudent bargains<sup>10</sup>, and is not to be used as a weapon to subvert proper commercial indemnity clauses<sup>11</sup> or clauses which have a long history of adoption within particular types of contract<sup>12</sup>. The fact the parties who agreed the clause should have been amply capable of protecting their own interests suggests that the agreed sum or rate is unlikely to be oppressive and should be upheld<sup>13</sup>. The rule operates within narrow constraints<sup>14</sup>, but retains a function in modern law and is still successfully invoked on occasions<sup>15</sup>.

1 *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41, (1993) Times, 15 February, PC. As to liquidated damages and penalties see PARA 1066 ante.

2 *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at 142, [1966] 1 WLR 1428 at 1447, CA, per Diplock LJ.

3 *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128, [1966] 1 WLR 1428, CA. See generally CONTRACT; EQUITY.

4 *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41 at 58-59, (1993) Times, 15 February, PC.

5 See PARA 1071 ante.

6 *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 193, Aust HC, per Mason J and Wilson J.

7 *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41 at 58-59, (1993) Times, 15 February, PC. This is ordinarily the case between commercial enterprises.

8 *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, Aust HC.

9 *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at 142, [1966] 1 WLR 1428 at 1447, CA, per Diplock LJ; *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41 at 58, (1993) Times, 15 February, PC; *JF Finnegan Ltd v Community Housing Association Ltd* (1993) BLR 103, 34 ConLR, obiter per Judge John Carr QC.

10 *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205 at 224, [1983] 1 WLR 399 at 403, HL per Lord Roskill. See also *Bridge v Campbell Discount Ltd* [1962] AC 600 at 624, [1962] 1 All ER 385 at 396, HL, per Lord Radcliffe.

11 *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205 at 224, [1983] 1 WLR 399 at 403, HL per Lord Roskill. See also *Bridge v Campbell Discount Co Ltd* [1962] AC 600 at 624, [1962] 1 All ER 385 at 396, HL, per Lord Radcliffe.

12 *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA (sum payable by tenant as reimbursement to landlord for expenditure on repairs).

13 *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41 at 59-60, (1993) Times, 15 February, PC.

14 *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41 at 60, (1993) Times, 15 February, PC.

15 See eg *Ariston SRL v Charly Records Ltd* (1990) Financial Times, 21 March, (1990) The Independent, 13 April, CA (flat-rate sum of £600 per day payable for late return of items bailed for use in record-making, the sum applying indiscriminately whether all or merely some items not returned; held, clause was designed to deter breach, imposed sum out of all proportion to some predictable levels of loss, and was penal). See further *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 at 439, [1988] 1 All ER 348 at 352-353, CA, per Bingham LJ; *AEG (UK) Ltd v Logic Resources Ltd* [1996] CLC 265, CA.

## UPDATE

### 1067 Exceptional nature, narrow bounds

NOTE 13--See also *M & J Polymers Ltd v Imerys Minerals Ltd* [2008] EWHC 344 (Comm), [2008] 1 All ER (Comm) 893 ('take or pay' clause upheld where entered into between parties of comparable bargaining power and commercially justifiable).



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1068. Improbable contingencies.

**1068. Improbable contingencies.**

In determining whether a payment obligation is a reasonable pre-estimate of loss, fanciful or improbable hypothetical events, which could in theory cause the agreed sum to significantly exceed the loss suffered, are excluded from consideration<sup>1</sup>. To pay regard to improbable contingencies would imperil the drafting and commercial value of agreed damages clauses, which are a useful instrument of commercial planning<sup>2</sup>.

1 *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41 at 59, (1993) Times, 15 February, PC.

2 *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41 at 59, (1993) Times, 15 February, PC.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1069. Time of assessment.

### **1069. Time of assessment.**

Whether a clause is a liquidated or agreed damages clause, or a penalty clause, is determined according to the circumstances prevailing at the date of formation of the contract<sup>1</sup> and not at the date of breach<sup>2</sup>. Events which occur after formation are not decisive as to the status of the clause because the court must have regard to the full range of potential events which were in the contemplation of the parties at the time of entry into the contract<sup>3</sup>. But events occurring after formation may enlighten this question by offering valuable evidence as to that loss which the parties can be taken to have contemplated at the time the clause was incorporated<sup>4</sup>.

1 Or, if later, the date of incorporation of the clause into an existing contract: see further CONTRACT.

2 *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41 at 56, (1993) Times, 15 February, PC.

3 *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41 at 56, (1993) Times, 15 February, PC. A clause will not, therefore, be classed as penal merely because the prescribed sum or formula proves, in the event, to exceed the loss suffered by the innocent party: *E Turner & Sons Ltd v Mathind Ltd* (1986) 5 Const LJ 273, 77 BLR 22, CA (JCT Contract). See further, as to building contracts, *J F Finnegan Ltd v Community Housing Association Ltd* (1993) 65 BLR 103, obiter per Judge John Carr QC (clause of JCT form was genuine pre-estimate of employer's loss). As to building contracts generally see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS.

4 *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41 at 58-59, (1993) Times, 15 February, PC; cf *Aitchison v Gordon Durham & Co Ltd* (30 June 1995, unreported), CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1070. Agreed substantial damages.

### **1070. Agreed substantial damages.**

Where parties to a contract agree<sup>1</sup> that one party will recover substantial damages on breach though the property which is the subject matter of the contract is owned by a stranger to the contract, or though a stranger otherwise bears or suffers the true substantial loss<sup>2</sup>, provisions of the contract which embody that agreement<sup>3</sup> are not penalties<sup>4</sup>, because the damages recovered are normally payable to the actual owner or sufferer<sup>5</sup>.

1 Or intend or contemplate: see *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA.

2 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA. See further PARA 1004 et seq ante.

3 Or intention or contemplation: see note 1 supra.

4 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA. See also *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA.

5 *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA. See further PARA 1004 et seq ante.

### **UPDATE**

### **1070 Agreed substantial damages**

NOTES--*Alfred McAlpine*, cited, reversed: [2000] 4 All ER 97, HL. See further PARA 1004 et seq.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1071. Actual or recoverable loss.

### **1071. Actual or recoverable loss.**

The comparator to be used in gauging the penal nature of a payment obligation may be the anticipated actual loss suffered by the innocent party or merely that party's anticipated recoverable loss, which may be lower<sup>1</sup>. Penalty clauses are ordinarily identified by comparing the sum which is agreed to be payable on breach with the damages which would be awarded at law<sup>2</sup>. The contemplated loss of the innocent party, by reference to which the penal character of a payment obligation is determined, is therefore normally that legally recoverable loss which the parties contemplated as flowing from the breach<sup>3</sup>. Sums stated to be payable where an innocent party terminates the contract by reason of the other party's repudiation must be compared with the common law measure which would be payable in that event, that is, the loss caused by loss of the bargain<sup>4</sup>. In certain cases, however, actual loss exceeding that which would be recoverable at law may be taken into account; for example, loss which does not satisfy the normal rules of remoteness<sup>5</sup>, or loss by way of disappointment or vexation which would not otherwise attract recompense<sup>6</sup>. However, an agreed payment is unlikely to be enforced where this would relieve the payee of the duty to mitigate his loss<sup>7</sup>.

<sup>1</sup> See Burrows *Remedies for Torts and Breach of Contract* (2nd Edn, 1994) pp 326-327. As to penalties and liquidated damages see PARA 1065 et seq ante.

<sup>2</sup> *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at 139, 142, [1966] 1 WLR 1428 at 1442, 1446, CA, per Diplock LJ (comparing the agreed sum with 'the damages which would have been recoverable ... at common law' and 'the measure of damages [the innocent party] would be entitled to at common law'); but cf at 140 and 1443 per Diplock LJ ('the actual loss which the plaintiffs would sustain'); at 141 and 1445 per Diplock LJ ('actual loss' and 'loss likely to be sustained'); at 142 and 1446-1447 per Diplock LJ ('such anticipated loss' and 'likely to be suffered' and 'liable to result'); and at 143 and 1448 per Diplock LJ ('If the contract contained an express undertaking by the defendant to be responsible for all actual loss occasioned by the defendant's breach, whatever that loss might turn out to be, it would not affect the defendant's liability for the loss actually sustained by the plaintiff that the defendant did not know of the special circumstances which were likely to cause any enhancement of the plaintiff's loss'). See also *Lombard North Central plc v Butterworth* [1987] QB 527 at 536-537, [1987] 1 All ER 267 at 272-273, CA, per Mustill LJ (the awardable damages adopted for purposes of this comparison are those which would be awarded for those breaches which the parties contemplated when incorporating the clause). See further *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 850, [1980] 1 All ER 556 at 567, HL, per Lord Diplock ('in excess of the amount which would fully compensate the other party for the loss sustained by him'); *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 578, [1993] 2 All ER 370 at 373, PC (deposits).

<sup>3</sup> *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at 142-143, [1966] 1 WLR 1428 at 1447-1448, CA, per Diplock LJ (who appears to espouse both measures), and at 134-135 and 1436-1437 per Denning LJ (actual loss). As to causation see PARA 1035 et seq ante.

<sup>4</sup> *Lombard North Central plc v Butterworth* [1987] QB 527 at 536-537, [1987] 1 All ER 267 at 272-273, CA, per Mustill LJ.

<sup>5</sup> See *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at 143, [1966] 1 WLR 1428 at 1448, CA, per Diplock LJ; and note 2 supra. Arguably, this envisages a case where the requirements of special contemplation of the claimant's loss are satisfied by convention. As to remoteness see PARA 1015 et seq ante.

<sup>6</sup> Cf *Ruxley Electronics and Construction v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL. As to recovery of damages for loss of amenity see PARA 957 et seq ante.

<sup>7</sup> See Beale *Remedies for Breach of Contract* (1980) p 57; Burrows *Remedies for Torts and Breach of Contract* (2nd Edn, 1994) p 327. As to mitigation see PARA 1041 et seq ante.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1072. Amount recoverable; liquidated damages clause.

**1072. Amount recoverable; liquidated damages clause.**

Where the stipulated sum is liquidated damages the plaintiff may recover this sum irrespective of his actual loss or the loss which he is able to prove<sup>1</sup>. He is not, however, entitled to disregard this sum and prove that he has suffered greater damage, and neither is the defendant entitled to prove that the plaintiff has suffered less damage<sup>2</sup>.

1 *Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41, (1993) Times, 15 February, PC; *Cellulose Acetate Silk Co v Widnes Foundry (1925) Ltd* [1933] AC 20, HL. A verdict for any other sum may be set aside: *Farrant v Olmius* (1820) 3 B & Ald 692. As to penalty clauses and liquidated damages see PARA 1065 et seq ante.

2 *Diestal v Stevenson* [1906] 2 KB 345. The plaintiff may, however, recover additional damages in respect of default which it was not within the parties' contemplation that the agreed liquidated damages should cover. Thus the rate of demurrage payable under a charterparty by a charterer who fails to load or discharge within a specified time does not cover damages for consequential loss of freight by the shipowner, who may recover for that loss, where the charterer has failed to provide a full cargo, in addition to the liquidated demurrage: *Akt Reidar v Arcos Ltd* [1927] 1 KB 352, CA. See further *Suisse Atlantique Société d'Armement Maritime SA v Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 All ER 61, HL. As to demurrage see CARRIAGE AND CARRIERS vol 7 (2008) PARA 287 et seq.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1073. Suing on penalty clause.

### 1073. Suing on penalty clause.

Where a clause is penal<sup>1</sup>, the innocent party is at liberty either to sue to enforce the clause itself<sup>2</sup>, which remains in the contract and capable of being sued upon<sup>3</sup>, or to disregard the clause and sue for damages at large<sup>4</sup>. The value of the former option is limited for two converse reasons. First, the stated penal sum becomes the maximum sum recoverable<sup>5</sup>, regardless of the true measure of the innocent party's loss<sup>6</sup>. Secondly, a penalty clause will not be enforced beyond the sum which represents actual loss<sup>7</sup>, that is (1) the actual loss<sup>8</sup> of the party seeking enforcement if the breach consists of the non-payment of money; or (2) the recoverable loss of the party seeking enforcement if the breach consists of failure to perform some other obligation<sup>9</sup>. The wiser course is to disregard the penalty clause and sue for damages at large<sup>10</sup>, which can exceed the sum stipulated in the clause<sup>11</sup>. It follows that little is lost by incorporating a penalty clause in the contract<sup>12</sup>.

1 As top penalty clauses and liquidated damages see PARA 1065 et seq ante.

2 *Jobson v Johnson* [1989] 1 All ER 621 at 632-633, [1989] 1 WLR 1026 at 1041-1042, CA, per Nicholls LJ.

3 *Jobson v Johnson* [1989] 1 All ER 621 at 633, [1989] 1 WLR 1026 at 1039-1040, CA, per Nicholls LJ. See further EQUITY vol 16(2) (Reissue) PARA 801 et seq.

4 *Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA; following *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66.

5 *Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA.

6 *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66.

7 *Jobson v Johnson* [1989] 1 All ER 621 at 633, [1989] 1 WLR 1026 at 1039-1040, CA, per Nicholls LJ.

8 Where different, this expression should ordinarily be read as the innocent party's recoverable loss, and is used in that sense in what follows: see PARA 1074 et seq post.

9 *Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA; following *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66 at 73 per Bailhache J.

10 *Jobson v Johnson* [1989] 1 All ER 621 at 633, [1989] 1 WLR 1026 at 1039-1040, CA, per Nicholls LJ.

11 *Jobson v Johnson* [1989] 1 All ER 621 at 632, [1989] 1 WLR 1026 at 1039-1040, CA, per Nicholls LJ; *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66 at 72-73 per Bailhache J. See also *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] AC 227, HL; *Maylam v Norris* (1845) 14 LJCP 95; *Harrison v Wright* (1811) 13 East 343; *Winter v Trimmer* (1762) 1 Wm BI 395. The point was, however, left open in *Cellulose Acetate Silk Co v Widnes Foundry (1925) Ltd* [1933] AC 20 at 26, HL, per Lord Atkin; and in *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at 142, [1966] 1 WLR 1428 at 1446-1447, CA, per Diplock LJ. See per contra *Elsley v JG Collins Insurance Agencies* [1978] 2 SCR 916, 83 DLR (3d) 1 (payee limited to penal amount stipulated).

12 See Hudson 'Penalties Limiting Damage' (1974) 90 LQR 31.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1074. Agreed underpitch of recoverable sum.

#### **1074. Agreed underpitch of recoverable sum.**

A clause requiring a party in breach to pay a sum which represents a deliberate or conscious underpitch of the innocent party's loss is a valid agreed damages clause and binds both parties<sup>1</sup> though not a true pre-estimate of loss<sup>2</sup>. This may follow even where the agreed rate of damages is nil<sup>3</sup>. Such clauses differ from limitation of damages clauses, which impose a ceiling on the sum recoverable, allowing the innocent party his actual loss up to, and not beyond, the stipulated sum<sup>4</sup>. An 'underpitch' clause provides for the agreed sum, or agreed rate, to be paid regardless of actual loss: the ceiling is also the floor<sup>5</sup>.

1 *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128, [1966] 1 WLR 1428, CA; *Diestal v Stevenson* [1906] 2 KB 345.

2 *Cellulose Acetate Silk Co v Widnes Foundry (1925) Ltd* [1933] AC 20, HL.

3 *Temloc Ltd v Errill Properties Ltd* (1987) 39 BLR 30, 12 ConLR 109, CA.

4 See CONTRACT.

5 See Treitel *The Law of Contract* (9th Edn, 1995) p 902, discussing whether the Unfair Contract Terms Act 1977 applies to such a clause, and concluding that it probably does not, because such a clause may extend as well as restrict liability. Moreover, the proper time for judging whether the payable sum is a reasonable pre-estimate of loss is the time of entry into the contract (*Phillips Hong Kong Ltd v A-G of Hong Kong* (1993) 61 BLR 41, (1993) Times, 15 February, PC; and see PARA 1069 ante) and that would rule out any taking into account of the actual amount of loss sustained in the event. Cf *Temloc Ltd v Errill Properties Ltd* (1987) 39 BLR 30, (1987) 12 ConLR 109, CA (nil damages clause) where the clause could never give more than the actual loss.

#### **UPDATE**

#### **1074 Agreed underpitch of recoverable sum**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1075. Non-monetary property.

### **1075. Non-monetary property.**

The rule against penalties<sup>1</sup> is not confined to promises to pay money<sup>2</sup>. It affects terms which require a party in breach to transfer non-monetary property, whether real<sup>3</sup> or personal<sup>4</sup>, to the innocent party<sup>5</sup>. In such a case, the exercise of the jurisdiction is necessarily modified<sup>6</sup>. Where the clause is penal but the value of the property does not exceed the innocent party's actual loss, the court may order specific performance of the agreement to transfer<sup>7</sup>. Where the clause is penal and the value of the property exceeds any reasonable pre-estimate of the innocent party's loss, partial specific performance should not be ordered, at least in cases of indivisible property and possibly in cases of divisible property, because that would be to rework the parties' bargain<sup>8</sup>. Ordinarily, the penal term will not be enforced, and the innocent party must sue for damages at large; but the court may order the sale of the property by the court and the payment of the debt from the proceeds<sup>9</sup>.

1 As to the rule against penalties see PARA 1065 ante.

2 *Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA (shares).

3 *Re Dagenham (Thames) Dock Co* (1873) 8 Ch App 1022.

4 *Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA; and see *Egan v State Transport Authority* (1982) 31 SASR 481.

5 Cf relief from forfeiture: see PARA 1076 post; and EQUITY vol 16(2) (Reissue) PARA 804 et seq.

6 *Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA.

7 *Jobson v Johnson* [1989] 1 All ER 621 at 636-637, [1989] 1 WLR 1026 at 1045-1046, CA, per Nicholls LJ (court can order (1) inquiry as to the value of the shares; and, if value does not exceed debt (2) specific performance of the agreement to transfer). As to specific performance see generally SPECIFIC PERFORMANCE.

8 *Jobson v Johnson* [1989] 1 All ER 621 at 636-637, [1989] 1 WLR 1026 at 1045-1046, CA, per Nicholls LJ.

9 *Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1076. Rule against penalties and relief against forfeiture.

### **1076. Rule against penalties and relief against forfeiture.**

Where a penal clause seeks to forfeit non-monetary property to the innocent party<sup>1</sup>, the contract breaker might seek equitable relief from forfeiture<sup>2</sup>. This jurisdiction applies not only to real<sup>3</sup> but to personal property, both tangible<sup>4</sup> and intangible<sup>5</sup>, where relief is otherwise appropriate<sup>6</sup>. It differs from the rule against penalties in that relief is at the discretion of the court and is normally conditional on payment of the debt together with interests and costs<sup>7</sup>. This puts the party enforcing the clause at an advantage compared to a party against whom the rule against penalties is pleaded<sup>8</sup>.

1 As to the rule against penalties see PARA 1065 ante.

2 As to equitable relief from forfeiture see EQUITY vol 16(2) (Reissue) PARA 804 et seq.

3 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 622.

4 *Barton Thompson & Co Ltd v Stapling Machines Co* [1966] Ch 499, [1966] 2 All ER 222; *Starside Properties Ltd v Mustapha* [1974] 2 All ER 567, [1974] 1 WLR 816; *Goker v NWS Bank plc* [1990] CCLR 34, (1990) Times, 23 May; *Transag Haulage Ltd v Leyland DAF Finance plc* [1994] BCC 356, (1994) Times, 15 January; *Jobson v Johnson* [1989] 1 All ER 621, [1989] 1 WLR 1026, CA.

5 *Sport International Bussum BV v Inter Footwear Ltd* [1984] 2 All ER 321, [1984] 1 WLR 776; *BICC Ltd v Burndy Corpn* [1985] Ch 232, [1985] 1 All ER 417.

6 As to these see generally EQUITY; LANDLORD AND TENANT. For an examination of factors material to the granting of equitable relief in a case involving tangible personal property see *Transag Haulage Ltd v Leyland DAF Finance plc* [1994] BCC 356, (1994) Times, 15 January.

7 *Jobson v Johnson* [1989] 1 All ER 621 at 636, [1989] 1 WLR 1026 at 1044, CA, per Nicholls LJ.

8 *Jobson v Johnson* [1989] 1 All ER 621 at 636-637, [1989] 1 WLR 1026 at 1045-1046, CA, per Nicholls LJ.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1077. Deposits.

### 1077. Deposits.

The rule against penalties does not apply to deposits<sup>1</sup>, which are an exception to that rule<sup>2</sup>. A deposit can be forfeited under the terms of an agreement<sup>3</sup> though its size bears no relation to the anticipated loss of the payee in consequence of the payer's breach<sup>4</sup>. Payers of deposits are protected by a separate equitable jurisdiction which relieves them from forfeiture if the deposit is unreasonable<sup>5</sup>. In that event, the court can refuse to order payment where the agreed sum has not been paid, or can order repayment where it has already been paid<sup>6</sup>. To be reasonable a deposit must, considered objectively, operate as earnest money and not as a penalty<sup>7</sup>. Reasonableness is not purely a question of local or trade practice<sup>8</sup>. Unreasonable deposits count as penalties<sup>9</sup>. The court will not substitute a reasonable sum for the unreasonable sum stipulated, though the payee may be allowed to deduct his recoverable loss from the sum to be repaid<sup>10</sup>.

1 As to the rule against penalties see PARA 1065 ante. As to deposits see generally EQUITY; SALE OF LAND. In determining whether a particular provision of a contract creates a deposit or a penalty, labels are not conclusive, and prospective payees cannot by designating extravagant sums as deposits escape the rule against penalties, if the payment is in fact unreasonable: *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] 2 All ER 370 at 373, PC; *Linggi Plantations v Jagatheesan* [1972] 1 MLJ 89 at 94, PC; *Stockloser v Johnson* [1954] 1 QB 476 at 491, [1954] 1 All ER 630 at 638, CA, per Denning LJ.

2 *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 578, [1993] 2 All ER 370, PC. This is so, though a deposit is an earnest to bind the payer to the bargain and may create, by the fear of its forfeiture, a motive in the payer to perform his obligations under the contract: *Howe v Smith* (1884) 27 ChD 89 at 101 per Fry LJ.

In certain cases involving contracts for the sale or supply of goods or the supply of services between a party acting for purposes of his business and a consumer, contract terms authorising the forfeiture of deposits may not be binding on the consumer by reason of the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159: see reg 5(1), Sch 3(1)(d) (terms which have the object or effect of permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract); and CONTRACT.

3 *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573, [1993] 2 All ER 370, PC. Where no express term as to destination accompanies the payment of a deposit, the 'term most naturally to be implied' is that, if the payer does not perform, the money remains the property of the payee: *Howe v Smith* (1884) 27 ChD 89 at 101 per Fry LJ. See also *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* supra at 579 and 373 per Lord Browne-Wilkinson (the right to forfeit arises independently of express stipulation).

4 *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 580, [1993] 2 All ER 370 at 374, PC.

5 *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 579-580, [1993] 2 All ER 370 at 373-374, PC; *Linggi Plantations v Jagatheesan* [1972] 1 MLJ 89 at 94, PC.

6 *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 581-582, [1993] 2 All ER 370 at 375-376, PC.

7 *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 579, [1993] 2 All ER 370 at 374, PC.

8 *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 579-580, [1993] 2 All ER 370 at 374, PC. In contracts for the sale of land, the practice of requiring a deposit of 10% of the purchase price affords the starting point in any inquiry as to whether a deposit is reasonable for this purpose, and the burden rests on any party seeking to justify a larger deposit to show that that is reasonable: *Workers Trust and*

*Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 580, [1993] 2 All ER 370 at 374, PC. See generally SALE OF LAND.

9 *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 580, [1993] 2 All ER 370 at 374, PC.

10 *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 581-582, [1993] 2 All ER 370 at 375-376, PC.

## **UPDATE**

### **1077 Deposits**

NOTE 2--SI 1994/3159 reg 5(1), Sch 3(1)(d) now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 8(1), Sch 2(1)(d).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1078. Rule against penalties generally inapplicable to debt.

**1078. Rule against penalties generally inapplicable to debt.**

Where an obligation is one of debt, the rule against penalties<sup>1</sup> does not apply to the agreed sum payable, even if that sum is ascertainable only when payment is due, unless the event on which payment is due is the breach of some contractual obligation by the payer to the payee<sup>2</sup>. This reflects the general principle that, to qualify as a penalty, the agreed sum must be payable on breach and not on some other event<sup>3</sup>. In principle a clause can be held to be penal where the breach consists only in the non-payment of a sum of money and the sum stipulated in the event of non-payment is greater than that which ought to have been paid<sup>4</sup>. In that sense, the rule against penalties can apply where the payer's primary obligation sounds in debt and not in damages<sup>5</sup>.

1 As to the rule against penalties see PARA 1065 ante.

2 *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA (tenant's liability to reimburse landlord for latter's expenditure on repairs not a liability in damages for breach of tenant's repairing covenant, and sounds in debt not damages; landlord's claim to reimbursement not triggered by tenant's breach of covenant but by landlord's own expenditure in effecting the repairs). See further PARA 1060 ante; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 454 et seq.

3 See PARA 1079 post.

4 *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA, citing Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, HL.

5 *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA, citing Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, HL.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1079. Payment on events other than breach.

**1079. Payment on events other than breach.**

A payment obligation qualifies as a penalty only if it imposes on the prospective payer a duty to make payment to the prospective payee on the breach of a contract committed by the prospective payer against the prospective payee<sup>1</sup>. The rule against penalties does not apply where a sum is payable on an event other than breach<sup>2</sup>, or in the event of a breach by a stranger to the contract, or in the event of a breach by the prospective payer of some contract between a third party and him<sup>3</sup>.

1 See further PARA 1080 post.

2 *Alder v Moore* [1961] 2 QB 57, [1961] 1 All ER 1, CA; and see PARA 1080 post.

3 *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205, [1983] 1 WLR 399, HL. It cannot be said that a clause of the last type fails to make a reasonable pre-estimate of the payer's liability to the payee, because the payer owes the payee no relevant contractual duty of which the payer is in breach. The payer's breach of his contract with the third party is not an event incurring liability to the payee, but merely a specified event on the occurrence of which a stipulated payment was to become due, and as such an indemnity and not a penalty: *Export Credits Guarantee Department v Universal Oil Products Co* supra at 223-224 and 402-403 per Lord Roskill.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1080. Sum payable on a certain event.

### **1080. Sum payable on a certain event.**

Where the parties to a contract agree that a stipulated sum shall become payable on a certain event which does not involve any breach of a contractual duty owed by the contemplated payer to the contemplated payee<sup>1</sup>, the rule against penalties does not apply<sup>2</sup> and does not preclude recovery of the sum<sup>3</sup>. An example of such an event is the exercise by one party of an option to terminate the contract<sup>4</sup>.

<sup>1</sup> See *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205 at 223, [1983] 1 WLR 399 at 402, HL per Lord Roskill; and PARA 1079 ante.

<sup>2</sup> *Associated Distributors Ltd v Hall* [1938] 2 KB 83, [1938] 1 All ER 511, CA; *Re Apex Supply Co Ltd* [1942] Ch 108, [1941] 3 All ER 473 (sum payable under hire purchase agreement on repossession of goods by owner following liquidation of hirer company); *Alder v Moore* [1961] 2 QB 57, [1961] 1 All ER 1, CA; *Lombank v Crossan* [1961] NI 192; *Goulston Discount Co Ltd v Harman* (1962) 106 Sol Jo 369, CA; *Bridge v Campbell Discount Co Ltd* [1962] AC 600, [1962] 1 All ER 385, HL (obiter at 614 and 387 per Viscount Simonds and at 641 and 388 per Lord Morton, but cf Lord Denning at 631 and 400 and Lord Devlin at 633 and 401; Lord Radcliffe expressed no conclusion on this question); *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205, [1983] 1 WLR 399, HL; *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA. See also *Else & Co Ltd v Hyde* (1926) Jones and Proudfoot notes on Hire Purchase Law 107, DC; *Roadways Transport Development Ltd v Browne and Gray* (1927) Jones and Proudfoot notes on Hire Purchase Law 118; *Chester and Cole Ltd v Avon* (1929) Jones and Proudfoot notes on Hire Purchase Law 115; *Chester and Cole Ltd v Wright* (1930) Jones and Proudfoot notes on Hire Purchase Law 124. As to the rule against penalties see PARA 1065 ante.

<sup>3</sup> *Alder v Moore* [1961] 2 QB 57, [1961] 1 All ER 1, CA (payment made under footballer's insurance policy on terms that if footballer played professional football as a playing member he would suffer a penalty to the extent of the amount paid out; held (Devlin LJ dissenting) this was a non-penalty clause for the payment of a certain sum on a certain event which was not a breach of contract, as the contract placed no ban on the footballer's playing again); *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA (sum payable by tenant to landlord to reimburse latter for expenditure on repairs: see PARA 1060 ante).

<sup>4</sup> *Associated Distributors Ltd v Hall* [1938] 2 KB 83, [1938] 1 All ER 511, CA (hire purchase agreement); *Bridge v Campbell Discount Co Ltd* [1962] AC 600, [1962] 1 All ER 385, HL; *Granor Finance v Liquidators of Eastore Ltd* 1974 SLT 296; *Lombank Ltd v Crossan* [1961] NI 192 (hire purchase agreement); *Goulston Discount Co Ltd v Harman* (1962) 106 Sol Jo 369, CA. See also *Cooden Engineering Co Ltd v Stanford* [1953] 1 QB 86, [1952] 2 All ER 915, CA; *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 QB 54, [1967] 2 All ER 345, CA. As to statutory limits on the amounts recoverable on the termination of regulated hire purchase agreements and special powers of the court in relation to such agreements see generally CONSUMER CREDIT.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1081. Payments to qualify for benefits.

**1081. Payments to qualify for benefits.**

Agreements which provide for the sharing of benefits among participants in a venture, but disallow any share to those participants who fail to maintain their subscriptions or contributions to the venture, are not ordinarily penalties, though the failure is a breach of the agreement and the sums forfeited by the agreement significantly exceed the loss occasioned by the breach<sup>1</sup>. In such a case the forfeiture agreement may escape the rule against penalties<sup>2</sup> by being an essential part of the relevant pooling agreement<sup>3</sup>.

1 *Nutting v Baldwin* [1995] 2 All ER 321, [1995] 1 WLR 201.

2 As to the rule against penalties see PARA 1065 ante.

3 *Nutting v Baldwin* [1995] 2 All ER 321 at 327, [1995] 1 WLR 201 at 208 per Rattee J. See also *Thos P Gonzales Corp v FR Waring (International) (Pty) Ltd* [1980] 2 Lloyd's Rep 160, CA (clause giving option to apply for extension of shipping period on specific terms not a penalty, where the specified scale of charges represented the price to be paid for the extension).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1082. Hold-back clauses.

### **1082. Hold-back clauses.**

A clause which seeks, in the event of breach, to deprive the contract breaker of sums due to him and held by the innocent party<sup>1</sup> is a penalty if it meets the general criteria<sup>2</sup> and is not a genuine pre-estimate of loss<sup>3</sup>. The party in breach might also obtain equitable relief against forfeiture<sup>4</sup>.

1 Eg retention moneys in the construction industry: see generally BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS.

2 See PARA 1065 et seq ante.

3 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, [1973] 3 All ER 195, HL, where a clause of a building sub-contract stated that 'If the Sub-contractor fails to comply with any of the conditions of this Sub-contract, the [main] Contractor reserves the right to suspend or withhold payment of any monies due or becoming due to the Sub-contractor.' Lord Salmon at 220 and 723 held the clause to be penal and unenforceable, because 'According to the natural meaning of its language, it would enable the contractors to suspend or withhold payment of very large sums of money due by them to the sub-contractors in the event of the sub-contractors committing some minor breach of contract causing only trivial damage in no way comparable to the amount owed to the sub-contractors'. It made no difference that the clause operated by confiscating disproportionate sums already possessed by the innocent party, rather than by enabling the innocent party to sue the guilty party for disproportionate sums.

4 See PARA 1076 ante; and EQUITY vol 16(2) (Reissue) PARA 804 et seq. See also the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, reg 5(1), Sch 3(1)(e); and CONTRACT vol 9(1) (Reissue) PARA 795.

### **UPDATE**

#### **1082 Hold-back clauses**

NOTE 4--SI 1994/3159 reg 5(1), Sch 3(1)(e) now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 8(1), Sch 2(1)(e).



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1083. Condition clauses.

### **1083. Condition clauses.**

Contracting parties may agree that a particular obligation owed by one of them shall be a condition of the contract<sup>1</sup>. Breach of a condition is a repudiation of the contract and the innocent party may, by accepting the repudiation, bring the contract to an end<sup>2</sup>. The damages payable are damages for loss of the entire bargain<sup>3</sup>. This affords a means of avoiding the rule against penalties<sup>4</sup>. Agreements that particular terms are conditions do not attract the rule<sup>5</sup>.

1 *Lombard North Central plc v Butterworth* [1987] QB 527, [1987] 1 All ER 267, CA. A condition is a term which, when broken, entitles the innocent party to abandon the contract, withhold all further performance, refuse all further performance by the guilty party and (where appropriate) sue for damages: see generally CONTRACT.

2 As to repudiation of a contract see CONTRACT vol 9(1) (Reissue) PARA 997 et seq.

3 *Lombard North Central plc v Butterworth* [1987] QB 527, [1987] 1 All ER 267, CA; BAILMENT vol 3(1) (2005 Reissue) PARA 58. This principle has been widely used in leasing and instalment purchase contracts, enabling finance companies to recover all future instalments in the event of the hirer's non-payment of a single instalment. The damages are computed over the whole period of the contract, including the outstanding portion of the contract which was still due to be performed when the innocent party accepted the guilty party's repudiation. They are not limited to losses suffered by the innocent party up to the date of termination, though there will be a rebate for accelerated payment. See generally CONSUMER CREDIT.

4 The forfeiture of the contract which occurs when the innocent party accepts the repudiation may inflict far greater losses on the guilty party than he is likely to inflict on the innocent party by virtue of the breach. The payment of damages for loss of the entire bargain likewise threatens the guilty party with a heavy liability, arguably out of proportion to the innocent party's predictable loss: see *Lombard North Central plc v Butterworth* [1987] QB 527, [1987] 1 All ER 267, CA. As to the rule against penalties see PARA 1065 ante.

5 'A clause expressly assigning a particular obligation to the category of condition is not a clause which purports to fix the damages for breaches of the obligation, and is not subject to the law governing penalty clauses' even though 'by promoting a term into the category where all breaches are ranked as breaches of condition, the parties indirectly bring about a situation where, for breaches which are relatively small, the injured party is enabled to recover damages as on the loss of the bargain, whereas without the stipulation his measure of recovery would be different': *Lombard North Central plc v Butterworth* [1987] QB 527 at 536-537, [1987] 1 All ER 267 at 272-273, CA, per Mustill LJ. Clear words are necessary to characterise a term as a condition: see generally CONTRACT. Even the use of the word 'condition' itself may be insufficient if the court is not convinced that the parties intended to use the word in its technical legal meaning: *Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL. On the other hand, use of the precise word 'condition' may be unnecessary. For example, it has been held sufficient to stipulate that punctual performance of a particular obligation shall be of the essence of the contract: *Lombard North Central plc v Butterworth* supra. See generally CONTRACT. See also the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159; and CONTRACT.

### **UPDATE**

### **1083 Condition clauses**

NOTE 5--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1084. Entire obligation clauses.

#### **1084. Entire obligation clauses.**

Stipulations that a particular contractual obligation is entire<sup>1</sup>, relieving the innocent party of all liability to pay the party in breach, do not appear to attract the rule against penalties<sup>2</sup>. This seems to be so, however great the disproportion between the loss caused to the innocent party by the breach and the loss caused to the party in breach by the stipulation, and notwithstanding that the clause may act as a strong deterrent to breach<sup>3</sup>.

<sup>1</sup> Although courts will lean heavily against interpreting a contract in this way (see *Button v Thompson* (1869) LR 4 CP 330; *Hoening v Isaacs* [1952] 2 All ER 176, [1952] 1 TLR 1360, CA) the remedy is in principle available whenever a contract is adequately drafted. See further CONTRACT vol 9(1) (Reissue) PARA 922.

<sup>2</sup> *Cutter v Powell* (1795) 6 Term Rep 320; *Sumpter v Hedges* [1898] 1 QB 673, CA (semble, but the point was not argued). As to the rule against penalties see PARA 1065 ante.

<sup>3</sup> The operation of the clause may deprive the guilty party of any recompense for services already performed, the value of which may far exceed the loss caused to the innocent party by the guilty party's breach (cf *Cutter v Powell* (1795) 6 Term Rep 320, where such disproportion arose from an event, viz the death of an employee, which did not constitute breach). Such a clause also appears to be free of control by the Unfair Contract Terms Act 1977 (see generally CONTRACT) though the point is not settled. See further the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159; and CONTRACT.

#### **UPDATE**

#### **1084 Entire obligation clauses**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 3--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1085. Unwanted performance after repudiation.

### **1085. Unwanted performance after repudiation.**

Terms which purport to entitle an innocent party to refuse to accept a repudiation, and to continue to proffer performance in that event, do not attract the rule against penalties<sup>1</sup>, at least where the innocent party has a legitimate interest in continuing to proffer unwanted performance<sup>2</sup> and where such performance would not require the co-operation of the party in breach<sup>3</sup>. In those circumstances, the agreement adds nothing to the innocent party's entitlement at law<sup>4</sup> and it is irrelevant that the cost to the contract breaker of paying for a complete and unwanted performance far exceeds the anticipated loss caused to the innocent party by the breach<sup>5</sup>. Whether the victim of a repudiatory breach can enforce an agreed right of continued performance even where these circumstances are absent is questionable<sup>6</sup>.

1 *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 at 427, [1961] 3 All ER 1178 at 1180, HL, per Lord Reid (whether the particular provision was a penalty clause or a liquidated damages clause was immaterial, because the clause provided merely for acceleration of the full stipulated price if the client failed to pay a single instalment timeously (and see further at 431 and 1183 per Lord Reid), at 446 and 1194 per Lord Hodson (unnecessary to determine whether the sum claimed under the provision was recoverable as a genuine pre-estimate of probable or possible interest in the due performance of the contract, or irrecoverable as a penalty, the only material obligation of the party in breach was to pay the sum claimed and it was difficult to see how damages should be assessed for breach of this obligation). Cf *White and Carter (Councils) Ltd v McGregor* supra at 443 and 1191 per Lord Keith of Avonholm (dissenting). As to the rule against penalties see PARA 1065 ante. See further the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159; and CONTRACT.

2 *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 at 431, [1961] 3 All ER 1178 at 1183, HL, per Lord Reid. Alternatively, where continued performance would not be contrary to all reason: *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1979] AC 757, [1979] 1 All ER 307, HL; *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH, The Puerto Buitogo* [1976] 1 Lloyd's Rep 250, CA; *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] 1 WLR 574, HL. See generally CONTRACT.

3 *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 at 430, [1961] 3 All ER 1178 at 1180-1183, HL, per Lord Reid. See also *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, [1970] 3 All ER 326.

4 *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 at 427, 430-431, [1961] 3 All ER 1178 at 1181, 1183, HL, per Lord Reid. But 'just as a party is not allowed to enforce a penalty, so he ought not to be allowed to penalise the other party by taking one course when another is equally advantageous to him': *White and Carter (Councils) Ltd v McGregor* supra at 431 and 1183 per Lord Reid.

5 *White v Carter (Councils) Ltd v McGregor* [1962] AC 413, [1961] 3 All ER 1178, HL.

6 It seems that the right will be debarred in such circumstances (see *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 at 431, [1961] 3 All ER 1178 at 1183, HL, per Lord Reid; and note 4 supra), although whether this denial is on grounds of the character of the clause as a penalty is more doubtful. Refusal to enforce the clause may conceivably occur on grounds of a more general principle of good faith or reasonableness in the exercise of contractual rights: see generally *Timeload Ltd v British Telecommunications plc* [1995] EMLR 459; *Philips Electronique Grand Publique v British Sky Broadcasting Ltd* (19 October 1994, unreported), CA; *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* (1996) 78 BLR 49 at 56-58 per Sir Thomas Bingham MR.

## **UPDATE**

### **1085 Unwanted performance after repudiation**

NOTE 1--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1086. Present debts and future indulgences.

**1086. Present debts and future indulgences.**

Where a contract stipulates that a debt is immediately payable, but the creditor by way of indulgence permits the debtor to make late payment provided certain conditions are fulfilled, and the debtor fails to satisfy those conditions, whereupon the debt again becomes immediately payable, then the re-activation of the debt as one immediately payable will not render the clause a penalty<sup>1</sup>.

<sup>1</sup> *Protector Loan Co v Grice* (1880) 5 QBD 592; *Oresundsvärvet Aktiebolag v Marcos Diamantis Lemos, The Angelic Star* [1988] 1 Lloyd's Rep 122, (1987) Independent, 12 November, CA; *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 57 ALJR 172 at 174 per 152 CLR 359. As to the rule against penalties see PARA 1065 ante.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/5. MEASURE OF DAMAGES IN CONTRACT/(4) CONSENSUAL ADJUSTMENT OF DAMAGES/1087. Exclusion and limitation of damages.

**1087. Exclusion and limitation of damages.**

In certain cases, parties may exclude or restrict liability for damages<sup>1</sup>.

<sup>1</sup> See CONTRACT vol 9(1) (Reissue) PARA 797 et seq.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1088. Choice of remedies.

## 6. MEASURE OF DAMAGES IN BAILMENT

### 1088. Choice of remedies.

Bailment is a transaction *sui generis*<sup>1</sup> and an action against a defaulting bailee may (according to circumstance) lie in contract, tort, or bailment<sup>2</sup>. The measure of damages is that appropriate to the cause of action. A restitutionary claim, grounded on either the bailor's or the bailee's unjust enrichment at the expense of the other, may also be available<sup>3</sup>.

1 *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247 at 261-262, [1965] 1 All ER 163 at 167-168, CA, per Lord Denning MR; and see Palmer *Bailment* (2nd Edn, 1991) p 229.

2 *Sutcliffe v Chief Constable of West Yorkshire* [1996] RTR 86 at 90, CA, per Otton LJ. See BAILMENT vol 3(1) (2005 Reissue) PARA 1. As to damages in tort see PARA 851 et seq ante. As to damages in contract see PARA 941 et seq ante.

3 As to restitutionary claims by bailees, grounded on the unjust enrichment of bailors see eg *China Pacific SA v Food Corpn of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL (indemnity for bailee's costs of preserving bailed goods against extraordinary hazards); *Brook's Wharf and Bull Wharf Ltd v Goodman Brothers* [1937] 1 KB 534, [1936] 3 All ER 696, CA (indemnity for bailee where bailor's goods disappeared from bonded warehouse without bailee's fault and statutory liability for customs duties exacted from bailee; at 545 and 707 Lord Wright MR expressly grounded the bailor's obligation to reimburse the bailee on the principle of unjust benefit rather than on the contract of bailment because there was no indication that the parties had ever contemplated such obligation, or as to what they would have agreed had they contemplated it). As to restitutionary claims by bailors, grounded on gains which have accrued to a bailee in breach by reason of the breach and which exceed the loss inflicted on the bailor see PARA 1099 post.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1089. Tort.

### **1089. Tort.**

The principal torts committed by a defaulting bailee are negligence and conversion<sup>1</sup>. Damages are awarded according to the specific rules which govern those torts. In each case, damages are normally compensatory<sup>2</sup>, their object being to restore the bailor to the position which he occupied before the tort was committed<sup>3</sup>. There is a broad degree of remedial flexibility in assessing the damages payable<sup>4</sup>. In conversion, where damages are measured by the value of the chattel converted, the time at which value is taken is the time most appropriate to achieve justice between the parties<sup>5</sup>. This may be the value at the date of judgment, or the value at the date of conversion, or the value at some intermediate date<sup>6</sup>.

1 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 738, [1965] 2 All ER 725 at 739, CA, per Salmon LJ. As to negligence generally see NEGLIGENCE. As to conversion see TORT.

2 But see PARA 1091 post. As to compensation generally see PARA 815 et seq ante. As to damages in tort see PARA 851 et seq ante.

3 *BBMB Finance (Hong Kong) Ltd v Eda Holdings Ltd* [1991] 2 All ER 129, [1990] 1 WLR 409.

4 *IBL Ltd v Coussens* [1991] 2 All ER 133, CA.

5 *IBL Ltd v Coussens* [1991] 2 All ER 133, CA.

6 *IBL Ltd v Coussens* [1991] 2 All ER 133, CA.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1090. Contract.

### **1090. Contract.**

Where a bailment arises by contract, the bailor may sue in contract to recover damages for loss of his expectation interest<sup>1</sup>. Subject to ordinary principles of remoteness<sup>2</sup> (and other constraints)<sup>3</sup> such damages will normally seek to put the bailor in the position which he would have occupied, had the breach not occurred<sup>4</sup>. This is the measure commonly applied in actions for breach of contracts of carriage, hire, storage or repair; the same measure is likely to apply in actions for breach of a bailee's duty to insure the chattel<sup>5</sup>. The bailor may alternatively claim for his reliance loss, that is, for costs or liabilities which he has incurred in reliance on the bailee's due performance of the contract, and which are now wasted by reason of the breach<sup>6</sup>. The normal principles of remoteness and other limiting factors govern such a claim<sup>7</sup>. In general, the bailor has an unfettered choice between the two forms of loss, and may even combine elements of each, provided this does not involve double claiming<sup>8</sup>. However, reliance losses cannot be recovered where the bailee shows that their award would allow the bailor to escape from a bad bargain<sup>9</sup>.

1 As to bailment by contract see BAILMENT vol 3(1) (2005 Reissue) PARA 38 et seq. As to the expectation interest see PARA 977 et seq ante.

2 As to remoteness of damage see PARAS 1015-1034 ante.

3 As to limiting factors generally see PARA 1015 et seq ante.

4 See PARA 977 ante. Liability may extend to taxes, customs duties or other levies or imposts which are visited on the bailor by reason of the bailee's breach, provided that the normal requirements of causation and remoteness are fulfilled.

5 *Lockspeiser Aircraft Ltd v Brooklands Aircraft Ltd* (1990) Times, 7 March.

6 *CCC Films (London) Ltd v Impact Quadrant Films* [1985] QB 16, [1984] 3 All ER 298. As to reliance loss see PARA 987 et seq ante.

7 See PARA 1015 et seq ante.

8 As to double recovery see PARA 948 ante.

9 See PARA 989 ante.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1091. General principle.

### **1091. General principle.**

The general principle is that damages for breach of bailment are compensatory<sup>1</sup>. The bailor recovers no more than his loss, which may, according to circumstance, be measured prospectively or retrospectively. In general, a bailor is entitled to recover that sum which will either put him in the position he should have occupied on performance or return him to the position he occupied before breach<sup>2</sup>. However, where performance of the terms of the bailment would have deprived the bailor of part of that which he had before the bailment was made, the bailor can recover only what he would have got from performance<sup>3</sup>.

<sup>1</sup> *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247 at 261-262, [1965] 1 All ER 163 at 168, CA, per Lord Denning MR ('At common law in a case of bailment, the general principle is restitutio in integrum, which means that the party damnified is entitled to such a sum of money as will put him in as good a position as if the goods had not been lost or damaged. This is subject, however, to the qualification that the damages must not be too remote, ie they must be such damages as flow directly and in the usual course of things from the loss or damage ... If the party damnified suffers damage of a special kind, he is entitled to recover it, subject to the qualification that the damages must not exceed such damages as would be produced in the ordinary course of things by the act complained of ... When goods are lost or damaged in transit, the damage ordinarily produced is, in the case of loss, the cost of replacement; or in the case of damage, the cost of repair. That is the amount which, in the absence of contract, the bailor can recover. He cannot recover indirect or consequential damages (such as loss of profits on a business) because those can only be recovered in cases on contracts proper, where notice of special circumstances is brought home').

<sup>2</sup> See BAILMENT vol 3(1) (2005 Reissue) PARA 86.

<sup>3</sup> This seems justified by the general principle that a claimant cannot by resorting to an alternative mode of assessment escape from a bad bargain: see PARA 989 ante. See also PARA 1090 ante.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1092. Measure akin to contract.

**1092. Measure akin to contract.**

Where a bailment is founded on contract, damages are likely to correspond to the measure awarded for breach of contract<sup>1</sup>, even though the action is for breach of bailment. Other than in a case of deviation<sup>2</sup> normal principles of remoteness are likely to apply<sup>3</sup>.

1 As to damages in contract see PARA 941 et seq ante.

2 As to deviation see PARA 1095 post.

3 Eg *McMahon v Field* (1881) 7 QBD 591, 50 LJQB 552, CA (action in contract; defendant broke contract to provide stabling for plaintiff's horses; plaintiff having deposited the horses in the stable, the defendant turned them out into cold weather causing them to develop colds, resulting in depreciation of sale value; held such loss recoverable as probably caused by defendant's breach). As to the normal principles of remoteness in an action for breach of contract see PARA 1015 et seq ante.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1093. Promissory actions on non-contractual bailments.

**1093. Promissory actions on non-contractual bailments.**

Where a bailment is consensual but not contractual<sup>1</sup>, and the bailor sues in bailment for breach of some express or implied promise by the bailee, a measure akin to that in contract may be awarded, subject to the bailee's contemplation<sup>2</sup>. Such a measure may apply where the action is founded on the breach of some additional promise by a gratuitous bailee, such as a depositary<sup>3</sup> or mandatary<sup>4</sup>. It may also apply where some promissory obligation is exceptionally enforceable by a head bailor against a sub-bailee<sup>5</sup>. Again, the normal principles of remoteness are likely to apply<sup>6</sup>.

1 See generally BAILMENT.

2 *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247, [1965] 1 All ER 163, CA. As to damages in contract see PARA 941 et seq ante.

3 See BAILMENT vol 3(1) (2005 Reissue) PARA 6 et seq.

4 See BAILMENT vol 3(1) (2005 Reissue) PARA 20 et seq.

5 *Brambles Security Services Ltd v Bi-Lo Pty Ltd* (1992) Aust Torts Rpts 81-161; and see Palmer *Bailment* (2nd Edn, 1991) Ch 20. See further BAILMENT vol 3(1) (2005 Reissue) PARA 88.

6 As to remoteness of damage see PARAS 851 et seq (tort), 1015 et seq (contract) ante.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1094. Measure akin to tort.

**1094. Measure akin to tort.**

In many actions (under both contractual and non-contractual bailments) the measure of damages in bailment will correspond with that in tort for negligence or conversion<sup>1</sup>. Typical cases may be bailments by non-commercial bailors, bailments of non-lucrative chattels and bailments of chattels which do not fluctuate in value between the dates of bailment and breach, or breach and judgment, respectively. The sum required to restore the bailor to the position which he occupied before the wrong was committed, and the sum required to put him in the position he would have occupied had bailment been performed, may in each case be the value of the chattel, together with incidental costs<sup>2</sup>.

1 As to damages in tort see generally para 851 et seq ante. As to negligence generally see NEGLIGENCE. As to conversion see TORT.

2 As to damages in relation to chattels see PARA 860 et seq ante.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1095. Deviation.

### 1095. Deviation.

A bailee who departs from one of the fundamental or essential terms on which the bailor granted him possession is strictly answerable for all ensuing loss of or damage to the chattel, irrespective of negligence on his part<sup>1</sup>. This principle applies to unrewarded bailees<sup>2</sup> as well as to bailees for reward<sup>3</sup>. By deviating from the terms of the bailment, the bailee forfeits his normal status as bailee and his ability to escape responsibility on proof of reasonable care<sup>4</sup>. This strict liability as an insurer of the goods extends to all ensuing loss or damage inflicted on the chattel, except that which would have occurred in any event, regardless of the deviation, and that which is attributable to the act of the bailor<sup>5</sup>. The liability arises independently of any liability in conversion<sup>6</sup> and appears to be an exception to the normal principles governing remoteness of damage<sup>7</sup>.

1 See BAILMENT vol 3(1) (2005 Reissue) PARA 18.

2 *Mitchell v Ealing London Borough Council* [1979] QB 1, [1978] 2 All ER 779.

3 *Lilley v Doubleday* (1881) 7 QBD 510; *Shaw & Co v Symmons & Sons* [1917] 1 KB 799; *Edwards v Newland & Co* [1950] 2 KB 534, [1950] 1 All ER 1072, CA.

4 See BAILMENT vol 3(1) (2005 Reissue) PARAS 18-19.

5 See BAILMENT vol 3(1) (2005 Reissue) PARA 19.

6 *Lilley v Doubleday* (1881) 7 QBD 510 at 511 per Grove J; and see Palmer *Bailment* (2nd Edn, 1991) p 1538. As to conversion see TORT.

7 *Lilley v Doubleday* (1881) 7 QBD 510 at 512 per Lindley J: 'The question is, what damages? *Hadley v Baxendale* is wide of the mark because the question here is whether the defendant was responsible for the goods, and if so the damages must be their value'. Cf *Van Dorne v North American Van Lines (Canada) Ltd* (1977) 79 DLR (3d) 42; affd (1979) 95 DLR (3d) 358. As to remoteness of damage see PARAS 851 et seq (tort), 1015 et seq (contract) ante.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1096. Misuse of chattel.

### 1096. Misuse of chattel.

In certain circumstances, a bailee who, in breach of bailment, detains the bailed chattel and uses or otherwise derives benefit from it must pay to the bailor a reasonable hire charge for the period of detention and use<sup>1</sup>. This liability is not confined to conventional bailees but attaches to all who wrongfully detain and use goods owned by others<sup>2</sup>. It applies to actions in conversion<sup>3</sup> (and formerly detinue<sup>4</sup>), but it does not apply to claims in negligence<sup>5</sup>.

1 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, [1952] 1 All ER 796, CA; *Hillesden Securities Ltd v Ryjak Ltd* [1983] 2 All ER 184, [1983] 1 WLR 959; *Gaba Formwork Contractors Pty Ltd v Turner Corp Ltd* (1993) 32 NSWLR 175. Liability is based on market rental value, ie the value in the market of the detainer's user of the chattel, because the wrong is the user and not the deprivation: *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* supra at 252 and 799 per Somervell LJ. The liability resembles, or derives from, a similar liability affecting trespass to land: *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* supra at 252 and 799 per Somervell LJ. See also *Inverugie Investments Ltd v Hackett* [1995] 3 All ER 841, [1995] 1 WLR 713, PC, especially at 845 and 717 per Lord Lloyd of Berwick (liability of trespassers to land does not depend on whether property owner can show that he would have let the property to anyone else, or on whether he would have used the property personally). As to trespass to land see TORT.

2 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, [1952] 1 All ER 796, CA; *Gaba Formwork Contractors Pty Ltd v Turner Corp Ltd* (1993) 32 NSWLR 175.

3 *Hillesden Securities Ltd v Ryjak Ltd* [1983] 2 All ER 184, [1983] 1 WLR 959, following *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, [1952] 1 All ER 796, CA (detinue). As to conversion see TORT.

4 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, [1952] 1 All ER 796, CA. Detinue has been abolished: see the Torts (Interference with Goods) Act 1977 s 2(1); and TORT.

5 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 252, [1952] 1 All ER 796 at 799, CA, per Somervell LJ and at 255 and 801 per Denning LJ. Quære as to liability for 'statutory' conversion under the Torts (Interference with Goods) Act 1977 s 2(2): see TORT. As to negligence generally see NEGLIGENCE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1097. Extent of the liability.

### **1097. Extent of the liability.**

The liability to pay a reasonable hire charge applies to profit-earning chattels which the owner ordinarily hires out for profit in the course of business<sup>1</sup> and which the detainer applies for his own purposes or in furtherance of his own ends<sup>2</sup>. It is no defence for the detainer to show that the owner would not have used the goods had they remained in his possession<sup>3</sup>; or that the owner had substitute goods available which he used without extra cost in place of those detained<sup>4</sup>; or that the owner might have been unable to find a hirer throughout the period of detention<sup>5</sup>; or even that there was no available market in which the owner could have hired out the goods<sup>6</sup>. Nor is it a defence that the goods were returned to the owner before judgment, provided at least that they were in the detainer's possession or control when the proceedings commenced<sup>7</sup>. The liability does not attach to those who detain goods without making any self-interested use of them<sup>8</sup>, but may attach to those who detain and use private chattels (such as domestic cars) whose owners do not use them for profit<sup>9</sup>.

1 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 252, [1952] 1 All ER 796 at 799, CA, per Somervell LJ and at 256 and 802 per Romer LJ.

2 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 252, [1952] 1 All ER 796 at 799, CA, per Somervell LJ, at 254-245 and 801 per Denning LJ and at 256 and 801 per Romer LJ.

3 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 254, [1952] 1 All ER 796 at 800, CA, per Denning LJ.

4 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 254, [1952] 1 All ER 796 at 800, CA, per Denning LJ.

5 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 256-257, [1952] 1 All ER 796 at 802, CA, per Romer LJ.

6 *Gaba Formwork Contractors Pty Ltd v Turner Corp Ltd* (1993) 32 NSWLR 175.

7 *Hillesden Securities Ltd v Ryjak Ltd* [1983] 2 All ER 184, [1983] 1 WLR 959; *Gaba Formwork Contractors Pty Ltd v Turner Corp Ltd* (1993) 32 NSWLR 175.

8 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 251-252, [1952] 1 All ER 796 at 799-800, CA, per Somervell LJ (semble), and at 253 and 801 per Denning LJ. See also *Saleh Farid v Theodorou and Blacklake Securities* (30 January 1992, unreported), CA. Examples would be carriers or warehouseman who detain goods without authority at the end of the agreed period of the bailment but merely store them passively: see *Brandeis Goldschmidt & Co Ltd v Western Transport Co Ltd* [1981] QB 864, [1982] 1 All ER 28, CA.

9 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 252, [1952] 1 All ER 796 at 799, CA, per Somervell LJ.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1098. Nature of the liability.

### 1098. Nature of the liability.

Opinion is divided as to whether the liability for market rental<sup>1</sup> is a compensatory liability (sounding in damages)<sup>2</sup> or a restitutionary liability (based on the detainer's unjust enrichment at the owner's expense)<sup>3</sup>. The lack of unanimity is replicated in those authorities which address the analogous question of tortious misuse of land<sup>4</sup>. Liability might be ascribed to modern principles of unjust enrichment<sup>5</sup> or to the narrower and older doctrine of waiver of tort<sup>6</sup>, but there is a dearth of modern conceptual analysis<sup>7</sup>. The identity of the detainer's obligation is material to the question of restitution of benefits<sup>8</sup>.

1 See PARA 1096 ante.

2 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 252, [1952] 1 All ER 796 at 799, CA, per Somervell LJ and at 257 and 802 per Romer LJ.

3 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 255, [1952] 1 All ER 796 at 801, CA, per Denning LJ; *Gaba Formwork Contractors Pty Ltd v Turner Corp'n Ltd* (1993) 32 NSWLR 175. See also *Inverugie Investments v Hackett* [1995] 3 All ER 841 at 845, [1995] 1 WLR 713 at 718, PC; and Palmer *Bailment* (2nd Edn, 1992) p 233; McKendrick 'Restitution and the Misuse of Chattels - The Need for a Principled Approach' in Palmer and McKendrick (eds) *Interests in Goods* (2nd Edn, 1998) p 912. As to restitution see RESTITUTION.

4 *Swordheath Properties Ltd v Tabet* [1979] 1 All ER 249 [1979] 1 WLR 285, CA *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 3 All ER 394, [1988] 1 WLR 1406, CA; *Inverugie Investments v Hackett* [1995] 3 All ER 841, [1995] 1 WLR 713, PC; *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359. In *Ministry of Defence v Ashman* (1993) 25 HLR 513 at 519, 66 P & CR 195 at 205, CA, Hoffmann LJ said: 'It is true that in earlier cases it has not been expressly stated that a claim for mesne profits can be a claim for restitution. Nowadays I do not see why we should not call a spade a spade. In this case the Ministry of Defence elected for the restitutionary remedy'. See generally McKendrick 'Restitution and the Misuse of Chattels - The Need for a Principled Approach' in Palmer and McKendrick (eds) *Interests in Goods* (2nd Edn, 1998) p 897; McGregor 'Restitutionary Damages' in Birks (ed) *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press, 1996), p 203; Beale 'Exceptional Measures of Damages in Contract' in Birks (ed) *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press, 1996).

5 McKendrick 'Restitution and the Misuse of Chattels - The Need for a Principled Approach' in Palmer and McKendrick (eds) *Interests in Goods* (2nd Edn, 1998) p 897. In the event that such analysis is correct the further question arises as to whether the restitutionary claim is independent or derivative: see *Inverugie Investments Ltd v Hackett* [1995] 3 All ER 841 at 845, [1995] 1 WLR 713 at 718, PC; and McKendrick 'Restitution and the Misuse of Chattels - The Need for a Principled Approach' in Palmer and McKendrick (eds) *Interests in Goods* (2nd Edn, 1998) p 897.

6 See TORT.

7 See McKendrick 'Restitution and the Misuse of Chattels - The Need for a Principled Approach' in Palmer and McKendrick (eds) *Interests in Goods* (2nd Edn, 1998) p 897. See further Goff and Jones *The Law of Restitution* (4th Edn, 1993) Ch 38; Birks *An Introduction to the Law of Restitution* (1989) Ch 10.

8 See PARA 1099 post.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1099. Restitution of benefits.

### 1099. Restitution of benefits.

Where the necessary conditions are met<sup>1</sup>, the detainer's liability for a reasonable hire charge is unaffected by the real benefit which he receives from his profitable misuse of the chattel<sup>2</sup>. Such benefit neither reduces nor increases the sum payable under this principle<sup>3</sup>. If, however, the owner suffers by reason of the detention or misuse a loss which exceeds a reasonable market rental, the greater amount may be recovered<sup>4</sup>. Moreover, a bailee who derives a benefit from the misuse of his bailor's chattel may be accountable for that benefit though it is unreflected in any loss to the bailor<sup>5</sup>. Such claims are restitutionary and not compensatory, being independent of loss<sup>6</sup>.

1 As to the detainer's liability for hire charge where the necessary conditions are met see PARA 1097 ante.

2 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 252, [1952] 1 All ER 796 at 799, CA, per Somervell LJ.

3 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 252, [1952] 1 All ER 796 at 799, CA, per Somervell LJ.

4 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 254, [1952] 1 All ER 796 at 801, CA, per Denning LJ (reasonable hire charge will cover normal wear and tear but the wrongdoer is additionally liable for further damage).

5 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 252, [1952] 1 All ER 796 at 799, CA, per Somervell LJ and at 255 and 801 per Denning LJ; *McAlpine & Sons Ltd v Minimax Ltd* [1970] 1 Lloyd's Rep 397; *Gaba Formwork Contractors Pty Ltd v Turner Corp Ltd* (1993) 32 NSWLR 175; *Brambles Security Services Ltd v Bi-Lo Pty Ltd* (1992) Aust Torts Rpts 81-161.

6 See *Gaba Formwork Contractors Pty Ltd v Turner Corp Ltd* (1993) 32 NSWLR 175. The liability may correspond with the older doctrine of waiver of tort: see PARA 1098 ante; and TORT.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1100. Bailee suing third party; common law.

### **1100. Bailee suing third party; common law.**

A bailee of goods can at common law<sup>1</sup> sue for loss or damage caused to the goods by a wrongdoer who is not the bailor<sup>2</sup>, and recover the full value of the goods (or the full cost of their repair or depreciation) as if he were the owner, for in the absence of the owner, the bailee's possession counts as title<sup>3</sup>. The bailee's right of full recovery is unaffected by the fact that his personal loss falls short of the full amount recovered or that he is not liable to the bailor for the event for which recovery is sought<sup>4</sup>. Actions by bailees against third parties are generally brought on the ground of negligence, trespass or conversion, but may also be brought in contract, in which event the same right of full recovery may apply<sup>5</sup>. Having recovered from the third party, the bailee must pay the residue of the proceeds, after deduction of his personal loss or the value of his personal interest, to the bailor<sup>6</sup>. Once either bailor or bailee has recovered in full from the third party, the other is debarred from suing him<sup>7</sup>.

1 For statutory modification see PARA 1101 post.

2 Where the wrongdoer is the bailor, the value of the wrongdoer's interest must be brought into account in measuring the liability to the bailee: *Brierley v Kendall* (1852) 17 QB 937.

3 *The Winkfield* [1902] P 42, CA. See also *O'Sullivan v Williams* [1992] 3 All ER 385, [1992] RTR 402, CA; *Chhabra Corp'n Pte Ltd v Jag Shakti (Owners)*, *The Jag Shakti* [1986] AC 337, [1986] 1 All ER 480, PC, holding the same rule to apply to a claimant having a mere immediate right to possession. See Palmer 'Possessory Title' in Palmer and McKendrick (Eds) *Interest in Goods* (2nd Edn, 1998) pp 68-71.

4 *The Winkfield* [1902] P 42, CA. See also *O'Sullivan v Williams* [1992] 3 All ER 385, [1992] RTR 402, CA; *Chhabra Corp'n Pte Ltd v Jag Shakti (Owners)*, *The Jag Shakti* [1986] AC 337, [1986] 1 All ER 480, PC. See further BAILMENT vol 3(1) (2005 Reissue) PARA 89.

5 See *Tanenbaum v W J Bell Paper Co Ltd* (1956) 4 DLR (2d) 177; *Terminal Warehouses Ltd v JH Lock & Sons Ltd* (1958) 12 DLR (2d) 12. See also Palmer *Bailment* (2nd Edn, 1991) p 316. As to trespass and conversion see TORT. As to negligence generally see NEGLIGENCE.

6 *The Winkfield* [1902] P 42, CA.

7 *O'Sullivan v Williams* [1992] 3 All ER 385, [1992] RTR 402, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1101. Bailee suing third party; statute.

**1101. Bailee suing third party; statute.**

A defendant in proceedings for wrongful interference with goods<sup>1</sup> is entitled to show, in accordance with the rule of court<sup>2</sup>, that some party other than the claimant has a better right to the goods than the claimant, or in right of which the claimant sues, and any rule to the contrary (sometimes called *jus tertii*) is abolished<sup>3</sup>. This provision may enable the defendant to secure that a third party whom he alleges to have an interest in the goods is joined as a party to the action and that all interests in the goods are apportioned in a single proceeding. The power is confined to claims in tort for wrongful interference with goods and does not apply where a bailee sues the wrongdoer in contract<sup>4</sup>.

1 See the Torts (Inteference with Goods) Act 1977 s 1; and TORT.

2 See *ibid* s 8(2); RSC Ord 15 r 10A; and TORT.

3 See the Torts (Inteference with Goods) Act 1977 s 8(1); and BAILMENT vol 3(1) (2005 Reissue) PARA 89; TORT.

4 This is because actions for wrongful interference with goods (to which the power applies) are confined to actions in tort: see the Torts (Interference with Goods) Act 1977 s 1 (as amended); and TORT. Actions in bailment may also fall outside the statutory concept of wrongful interference with goods: see TORT.

**UPDATE**

**1101 Bailee suing third party: statute**

TEXT AND NOTE 2--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1102. Bailee insuring bailor's goods.

**1102. Bailee insuring bailor's goods.**

A bailee can insure his bailor's goods in his own name and for his own account and recover their full value in the event of loss or destruction<sup>1</sup>. Having recovered in full, the bailee holds the residue of the insurance monies (after deducting the value of his own interest) for the bailor<sup>2</sup>.

1 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 at 846, [1976] 3 All ER 129 at 136-137, HL, per Lord Diplock; Palmer *Bailment* (2nd Edn, 1991) Ch 4 p 305. See INSURANCE vol 25 (2003 Reissue) PARA 698 et seq.

2 *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451, [1966] 1 All ER 418, HL; *Re E Dibbens & Sons Ltd (in liquidation)* [1990] BCLC 577; *DG Finance Ltd v Andrew Scott and Eagle Star Insurance Co Ltd* (15 June 1995, unreported), CA. An analogous principle has been held to entitle a construction contractor to insure the whole of the contract works and not merely his personal interest therein or his personal liability therefor: *Petrofina (UK) Ltd v Magnaload Ltd* [1984] QB 127 at 136, [1983] 3 All ER 35 at 42 per Lloyd J.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1103. Action by bailor against bailee; common law.

### **1103. Action by bailor against bailee; common law.**

A party may be a bailor where he has a superior right to the possession of goods which are in the possession of another<sup>1</sup>. A bailor of goods need not be their general owner provided he has a right of possession superior to that of the current possessor<sup>2</sup>. A superior right to possession may exist for this purpose regardless of whether the holder possessed the goods before their delivery to the bailee<sup>3</sup>. A bailee is estopped at common law from denying his bailor's title to the goods, or from relying on the fact that some third party has a better right to the goods, in diminution of the damages recoverable by the bailor<sup>4</sup>. Having recovered in accordance with this principle, the bailor must pay the proceeds of the claim, after deducting the value of his own interest or the measure of his own loss, to the party entitled to the goods<sup>5</sup>. In such a case it is for injury to his possessory interest that the bailor is compensated rather than for damage to some other economic interest<sup>6</sup>.

1 See generally BAILMENT.

2 See BAILMENT vol 3(1) (2005 Reissue) PARA 1.

3 See BAILMENT vol 3(1) (2005 Reissue) PARA 1.

4 See BAILMENT vol 3(1) (2005 Reissue) PARA 84. Thus where a carrier delegates performance of the contract of carriage to a sub-carrier while retaining a right to possession of the goods against the sub-carrier, the sub-carrier is a sub-bailee and is at common law estopped from denying the first carrier's title. The first carrier may recover substantial damages from the sub-carrier for breach of the sub-bailment, notwithstanding that the first carrier's personal loss (or the amount of his liability to the original bailor) is nominal: cf *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128, [1988] FTLR 54, CA. See generally CARRIAGE AND CARRIERS.

5 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 728-729, [1965] 2 All ER 725 at 732-733, CA, per Lord Denning MR, citing *The Winkfield* [1902] P 42, CA. See also *Minichiello v Devonshire Hotel (1967) Ltd (No 2)* (1977) 79 DLR (3d) 656 (affd [1978] 4 WWR 539); and see Palmer *Bailment* (2nd Edn, 1991) pp 304-305, 1365.

6 *Obestain Inc v National Mineral Development Corp'n Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 468, 470 per Hobhouse J. See further CARRIAGE AND CARRIERS vol 7 (2008) PARA 752 et seq.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1104. Action by bailor against bailee: statute.

#### **1104. Action by bailor against bailee: statute.**

The common law position is modified by statute<sup>1</sup>. The defendant in an action for wrongful interference with goods is entitled to show, in accordance with the rules of court<sup>2</sup>, that a third person has a better right than the plaintiff as respects all or any part of the interest claimed by the plaintiff, or in right of which he sues; and any rule of law to the contrary (sometimes called *jus tertii*) is abolished<sup>3</sup>. The bailee's estoppel appears to have been abolished by this provision, but the estoppel may survive where the bailor sues other than in tort (for example, for breach of contract or breach of bailment)<sup>4</sup>. In that event full damages may continue to be recoverable but the residue is again held on behalf of the substantial interests in the goods<sup>5</sup>.

<sup>1</sup> See the Torts (Interference with Goods) Act 1977 s 8: see TORT. As to the common law position see PARA 1103 ante.

<sup>2</sup> See *ibid* s 8(2); RSC Ord 15 r 10A; and TORT.

<sup>3</sup> See the Torts (Interference with Goods) Act 1977 s 8(1); and TORT.

<sup>4</sup> As to the choice of causes of action see PARA 1088 ante.

<sup>5</sup> If, however, a consignor relinquishes his possessory entitlement to the goods on delivery to the carrier, leaving no possessory interest outstanding in himself, he cannot stand as the carrier's bailor and cannot at common law recover full damages from him under the foregoing principle. This result may occur where a bailee of goods contracts with a carrier for the return of the goods to their owner, or where a sub-bailee of goods contracts with a carrier for the return of the goods to a principal bailee, although there are authorities suggesting that in particular circumstances the bailee or sub-bailee can sue the carrier. A similar result may occur where a seller contracts with a carrier as agent for the buyer and property in the goods passes to the buyer on or before delivery to the carrier. In such a case the bailor is presumed to be the consignee, and the consignor is presumed to act as the consignee's agent not only in concluding the contract of carriage but also in concluding the bailment to the carrier: *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL. It follows that the consignor generally has no outstanding possessory entitlement and cannot occupy the position of bailor to the carrier. A mere contractual right to the possession of goods may be insufficient to render the party thus entitled a bailor of the current possessor: *China Pacific SA v Food Corpn of India, The Winson* [1982] AC 939, [1981] 3 All ER 688, HL. See generally CARRIAGE AND CARRIERS. But cf para 1106 note 2 post; and see Palmer 'Possessory Title' in Palmer and McKendrick (eds) *Interest in Goods* (2nd Edn, 1998) p 63.

#### **UPDATE**

#### **1104 Action by bailor against bailee: statute**

TEXT AND NOTE 2--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1105. Claims against carriers; property passing after contract but before breach.

### **1105. Claims against carriers; property passing after contract but before breach.**

A consignor of goods who is a party to the contract of carriage<sup>1</sup>, but suffers no substantial loss from the carrier's breach because property in the goods has passed from him before the breach occurred, cannot ordinarily recover substantial damages, because recovery would offend the general rule that damages are compensatory<sup>2</sup>. However, in a commercial contract concerning goods, where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been concluded and before a breach of that contract which causes loss or damage to the goods, an original party to the contract is (if this is intended by both parties) to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in goods before such loss or damage, and can recover as damages for breach of contract the actual loss sustained by those for whose benefit the contract was concluded<sup>3</sup>. The consignor must pay the residue of the substantial damages recovered (after deducting his personal loss or the value of his personal interest) for the account of the actual owner<sup>4</sup>.

1 See CARRIAGE AND CARRIERS vol 7 (2008) PARA 752 et seq. Where a consignor has the general property in the goods at the time of contracting and retains such property throughout the period of carriage he is normally the proper party to sue on the contract: *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL. This accords with the principle that the proper party to sue where goods are lost or damaged is the owner and that the party having property in the goods is prima facie the party with whom the contract of carriage is made: see CARRIAGE AND CARRIERS vol 7 (2008) PARA 752. Where, however, consignor and consignee are different parties, and property either resides in the consignee throughout the period of carriage or passes to the consignee on or before delivery to the carrier, it may be presumed that the consignor concludes the contract of carriage as agent for the consignee and that the consignor cannot sue on the contract unless specially entitled by its terms. In such a case the consignee, as principal, is the proper party to sue on the contract. Such a presumption certainly applies where the consignor sells goods to a consignee and property passes to the consignee, for example by the act of delivery to the carrier: see the Sale of Goods Act 1979 s 32; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 188. In such a case the seller-consignor is presumed to contract as agent for the buyer-consignee rather than as a principal in his own right, although the presumption can be rebutted by special terms in the contract of sale. It follows that the consignee is normally the proper party to sue on the contract. There may, however, be circumstances where a contract for the carriage of goods by land is a contract between the consignor and the carrier notwithstanding the fact that the goods are to be delivered to a consignee who has the general property in them. This may occur where, though delivery to the consignee is contemplated when the contract of carriage is made, consignor and carrier make a special contract to the effect that the consignor transacts as principal. A comparable situation may arise where the transfer of property to the consignee and the delivery of the goods to him were not contemplated by consignor and carrier when making the contract of carriage, but occurred following a later sale of the goods by the consignor after transit began: *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL.

2 *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL. As to the rule that damages are compensatory see PARA 1091 ante.

3 *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL; *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA; *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA. See also CARRIAGE AND CARRIERS vol 7 (2008) PARA 754. The intention necessary to sustain the foregoing principle may be negated (1) where the contract of carriage contemplates that the carrier will conclude a separate contract of carriage with the party to whom property later passes; and (2) a fortiori where the contractual rights of a charterer under a charterparty are not identical with those of the bill of lading holder whose goods are lost or damaged: *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* supra; but cf *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, CA; *Alfred McAlpine Construction Ltd v Panatown Ltd* (1998) 58 ConLR 46, (1998) Times, 11 February, CA (recovery permitted under similar principle where building contractor had direct contract with building owner; right to substantial damages a matter of contemplation or



intention). The principle stated in the text does not apply where consignor and carrier do not contemplate, at the time the contract of carriage is concluded, that the consignor will transfer property in the goods to a third party after the contract of carriage is concluded: but cf *Darlington Borough Council v Wiltshier Northern Ltd* supra; *Alfred McAlpine Construction Ltd v Panatown Ltd* supra (recovery of substantial damages permitted under similar principle where ownership of building (by party not privy to building contract) remained constant throughout). If no such transfer is contemplated at the time the contract of carriage is made, the parties will normally have no intention to treat the consignor as entitled to recover substantial damages in contract on behalf of anyone to whom property passes before the goods are lost or damaged. In such a case the consignor may be unable to recover substantial damages in contract but such damages may be recoverable in tort (or possibly in bailment) by the party to whom property is transferred. The right of the party to whom property passes to sue for substantial damages may not, however, extend to every misadventure which occasions loss to a consignee; eg in the absence of contract there may be no right of action in respect of a negligently-occasioned delay: see NEGLIGENCE; TORT.

4 *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774, [1976] 3 All ER 129, HL.

## UPDATE

### **1105 Claims against carriers; property passing after contract but before breach**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 3--*Alfred McAlpine*, cited, reversed: [2000] 4 All ER 97, HL.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1106. Action founded on ownership or possession of goods; location of risk irrelevant.

**1106. Action founded on ownership or possession of goods; location of risk irrelevant.**

A right to substantial damages for the loss of, or damage to, goods can be proved by showing possession or ownership of the goods at the time of the wrong, regardless of whether the goods are at the risk of the owner or possessor<sup>1</sup>. In this event, it is the loss to the proprietary or possessory interest that is compensated, not some other or different economic loss<sup>2</sup>. An owner or possessor who recovers substantial damages by virtue of this principle, however, may be obliged to account for the residue (after deducting his personal loss) to the party at whose risk the goods were at the time of their loss or injury<sup>3</sup>.

1 *Obestain Inc v National Mineral Development Corpn Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 468, 470 per Hobhouse J.

2 *Obestain Inc v National Mineral Development Corpn Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 468, 470 per Hobhouse J. Where the bailor does not have an immediate right to the possession of the goods at the time of the wrong, and his action is an action on the case for damage to his reversionary interest grounded on a mere deferred right of possession, his damages are calculated according to the impairment of that reversionary interest, whether this occurs through deprivation or physical harm: *Tancred v Allgood* (1859) 4 H & N 438; *Matthews v Eastley* (13 March 1998, unreported), NSW SC, citing Fleming *Law of Torts* (7th Edn, 1987) p 60. Where a consignor or consignee who has a contract with a carrier suffers substantial personal loss through breach of the contract of carriage, the consignor or consignee can recover substantial damages in contract irrespective of whether he has a proprietary or possessory interest in the goods, provided the claim satisfies general principles of remoteness of damage: *Mead v S E Rly Co* (1870) 18 WR 735 (semble). See also *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895 at 906, [1995] 1 WLR 68 at 78-79, CA, per Steyn LJ. See further CARRIAGE AND CARRIERS vol 7 (2008) PARA 755. As to remoteness of damage see PARA 1015 et seq ante.

3 *RG & TJ Anderson v Chamberlain John Deere Pty Ltd* (1988) 15 NSWLR 363 at 371, NSW CA, per Hope JA. See also *R & W Paul Ltd v National Steamship Co Ltd* (1937) 43 Com Cas 28 at 33-34, (1937) 59 Ll L Rep 68 at 79 per Goddard J, cited in *Obestain Inc v National Mineral Development Corpn Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 468 per Hobhouse J, and in *The Aramis* [1989] 1 Lloyd's Rep 213 at 226, CA, per Bingham LJ. See further CARRIAGE AND CARRIERS vol 7 (2008) PARA 755.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1107. Legal property or possessory title at time of tort.

### **1107. Legal property or possessory title at time of tort.**

In an action in tort for negligence founded on the loss of, or damage to, goods, the claimant must show either the legal property in the goods<sup>1</sup>, or a possessory title to them, at the time of loss or damage<sup>2</sup>. A bailor who, at that time, had the legal property in goods held by a defaulting bailee can gain substantial damages in tort from the bailee<sup>3</sup>, though the goods were at the risk of some third party and the bailor's loss is nominal, for it is the legal property which gives the right to substantial damages<sup>4</sup>. A similar right to substantial damages arises where a bailor has a possessory title falling short of legal ownership in goods which are lost or damaged while in the bailee's possession<sup>5</sup>. In tort, the title to sue and the recovery of substantial damages are concurrent and it is the proprietary or possessory interest that is being compensated, not some other or different economic loss<sup>6</sup>. Whether the claimant could recover his loss from some other person is therefore immaterial<sup>7</sup>. However, a legal owner or person entitled to possession of goods who recovers full damages from a bailee may be obliged to account for any residual value (after deducting the value of his interest or the measure of his personal loss) to the person at whose risk the goods were held at the material time<sup>8</sup>.

1 Mere equitable property is insufficient unless accompanied by a possessory title: *MCC Proceeds Inc v Lehmann Bros International (Europe)* (1998) Times, 14 January, CA, explaining *International Factors Ltd v Rodriguez* [1979] QB 351, [1979] 1 All ER 17, CA. See further CARRIAGE AND CARRIERS vol 7 (2008) PARA 757.

2 *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785 at 808, [1986] 2 All ER 145 at 148, HL, per Lord Brandon of Oakbrook. A possessory title may consist of a right of possession as well as possession itself, though the point is left open in *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128 at 138, [1988] 1 FTLR 54 at 64-65, CA, obiter per Slade LJ. See also *The Hamburg Star* [1994] 1 Lloyd's Rep 399 at 404 per Clarke J (point arguable). Where a party with an immediate right to the possession of goods sues in tort in respect of that interest, he can at common law recover damages in tort for negligence representing the full value of the goods or the cost of their depreciation or repair, though the value of his personal interest is less than the full value; in this respect the claimant's right resembles that of a claimant having actual possession of the goods at the time of their loss or damage: see *Chabbra Corpn Pte Ltd v Jag Shakti (Owners), The Jag Shakti* [1986] AC 337, [1986] 1 All ER 480, PC (conversion). See further CARRIAGE AND CARRIERS vol 7 (2008) PARA 757. As to damages for conversion see PARA 861 ante. Note also the statutory alteration of the common law principle: see PARA 1104 ante. Having recovered the full value, the party with an immediate right of possession must account to the true owner for the residue after deducting the value of his own interest: see PARA 1106 ante; and BAILMENT. Where a party having only a deferred right to the possession of goods sues for enduring damage to his reversionary interest (as to which see PARA 1106 note 2 ante) the primary measure of damages payable to him is the value of (or the diminution in value inflicted on) that reversionary interest: *Mears v London and South Western Rly Co* (1862) 11 CBNS 850; *Candlewood Navigation Corpn Ltd v Mitsui OSK Lines Ltd, The Mineral Transporter* [1986] AC 1, [1985] 2 All ER 935, PC; *Hunter v Canary Wharf Ltd* [1997] AC 655 at 692, [1997] 2 All ER 426 at 438, HL, per Lord Goff of Chieveley.

3 Unless his title was a bare proprietary one and did not include any right to the possession of the goods: *Obestain Inc v National Mineral Development Corpn Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465. See also CARRIAGE AND CARRIERS vol 7 (2008) PARA 757.

4 *Obestain Inc v National Mineral Development Corpn Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 468, per Hobhouse J. See also *The Aramis* [1989] 1 Lloyd's Rep 213, CA.

5 *Obestain Inc v National Mineral Development Corpn Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 470 per Hobhouse J; and see CARRIAGE AND CARRIERS vol 7 (2008) PARA 757.

6 *Obestain Inc v National Mineral Development Corpn Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465 at 468 per Hobhouse J.

7 In such a case, the bailee is estopped at common law from denying the consignor's title: see PARA 1103 ante. For the position under statute para 1104 ante.

8     *Obestain Inc v National Mineral Development Corpn Ltd, The Sanix Ace* [1987] 1 Lloyd's Rep 465; *Paul (R & W) v National Steamship Co Ltd* (1937) 59 Ll L Rep 28, 43 Com Cas 68; *RG & TJ Anderson Pty Ltd v Chamberlain John Deere Pty Ltd* (1988) 15 NSWLR 363, NSW CA; *The Aramis* [1989] 1 Lloyd's Rep 213, CA. See further CARRIAGE AND CARRIERS vol 7 (2008) PARA 757.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/6. MEASURE OF DAMAGES IN BAILMENT/1108. Presumption of highest value.

### **1108. Presumption of highest value.**

Where, by reason of a bailee's actual or presumed fault, a bailor cannot prove the value of goods lost or destroyed, the highest possible value is presumed against the bailee<sup>1</sup>. The rule is not limited to bailees but applies generally in actions for wrongs inflicted on chattels<sup>2</sup> and in other actions where material evidence as to the value of a claim has been destroyed or impaired<sup>3</sup>. It appears to reflect a general rule that no party can rely on his own default to escape liability, where the effect of that default is to disable the claimant from showing how much he has lost in consequence of it<sup>4</sup>.

1 *Armory v Delamirie* (1722) 1 Stra 505 per Pratt CJ; *Indian Oil Corp v Greenstone Shipping SA (Panama), The Ypatianna* [1988] QB 345 at 368, [1987] 3 All ER 893 at 906 per Staughton J ('Two points of significance in my view emerge from the authorities. First, in some cases a decision had to be made 'not upon the notion, that strict justice was done, but upon this, that it was the only justice that could be done' (see *Lupton v White* (1808) 15 Ves 432 at 441 per Lord Eldon LC). Or as Lord Moulton put it, such cases 'have been little more than instances of cutting the Gordian knot - reasonable adjustments of the rights of the parties in cases where complete justice was impracticable of attainment' (see *Sandeman & Sons v Tyzack and Branfoot Steamship Co Ltd* [1913] AC 680 at 694, HL, per Lord Moulton). Secondly, if the wrongdoer has destroyed or impaired the evidence by which the innocent party could show how much he has lost, the wrongdoer must suffer from the resulting uncertainty').

2 *Indian Oil Corp v Greenstone Shipping SA (Panama), The Ypatianna* [1988] QB 345 at 369, [1987] 3 All ER 893 at 906, CA, per Staughton LJ.

3 *White v Lady Lincoln, Duke of Newcastle v Kinderley* (1803) 8 Ves 363 (agent and manager, who was also solicitor, retaining only those accounts, vouchers etc which told in his favour); *Gray v Haig* (1854) 20 Beav 219 (commission claim by agent; agent had disposed of account books and records); *The Duke of Leeds v The Earl of Amherst* (1850) 20 Beav 239; *Dean v Thwaite* (1855) 21 Beav 621 (wrongful mining of coal; uncertainty as to how much coal defendant mined over period for which liability extended); *Williams v Williams* (1863) 33 Beav 306 (destruction of will); and see *Lupton v White* (1808) 15 Ves 432 (agent confusing with agent's own principal's property derived from lead mines). The inference dictated by the general rule must, in order to operate, be consistent with the other evidence and with other facts proved or admitted: *Malhotra v Dhawan* (26 February 1997, unreported), CA.

4 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 414, Aust HC, per Dixon J and Fullagar J; and see *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 257, [1952] 1 All ER 796 at 802, CA, per Romer LJ.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/7. MEASURE OF DAMAGES IN MISREPRESENTATION/1109. Statutory right to damages.

## 7. MEASURE OF DAMAGES IN MISREPRESENTATION

### 1109. Statutory right to damages.

By statute, there is a right to damages for non-fraudulent misrepresentation<sup>1</sup>. Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto<sup>2</sup> and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof, had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he has reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true<sup>3</sup>. The measure of damages awardable under this provision is the measure for fraud<sup>4</sup>. Subject to any reduction for contributory negligence on his part<sup>5</sup>, the misrepresentee recovers all loss flowing directly from the misrepresentation<sup>6</sup>, whether foreseeable or not<sup>7</sup>. Liability under this provision appears closer to tort than to contract<sup>8</sup>, though the right to damages is held to be *sui generis*<sup>9</sup>. The misrepresentee is entitled to an award of money which will return him to the position he was in before the misrepresentation was made, but is not entitled to be compensated for loss of expectation or to receive loss of bargain damages<sup>10</sup>. The normal date by reference to which damages are measured is the date of contracting<sup>11</sup>, so that where a buyer of goods<sup>12</sup> or land<sup>13</sup> or shares<sup>14</sup> is induced to conclude the contract by a relevant misrepresentation, the normal measure of damages is the difference between the value of the asset at the date of the contracting, and the value the asset would have had at that time, were the misrepresentation true<sup>15</sup>. However, special circumstances may entitle the court to adopt, as the lower measure, the value of the asset at some later date<sup>16</sup> and so compensate a misrepresentee for a post-contractual fall in value<sup>17</sup>.

<sup>1</sup> See under the Misrepresentation Act 1967 s 2(1): see PARA 1110 post; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 801.

<sup>2</sup> See *Resolute Maritime Inc v Nippon Kaiji Kyokai, The Skopas* [1983] 2 All ER 1, [1983] 1 WLR 857 (liability inapplicable to agent making contract on behalf of principal).

<sup>3</sup> See the Misrepresentation Act 1967 s 2(1); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 801. The fact that a misrepresentee has affirmed rather than rescinded the contract does not preclude an action for damages under this provision: *Production Technology Consultants Ltd v Bartlett* [1988] 1 EGLR 182.

<sup>4</sup> *Chesneau v Interhome Ltd* [1983] CLY 988, 134 NLJ 341, CA; *F & H Entertainments Ltd v Leisure Enterprises Ltd* (1976) 120 Sol Jo 331, 240 EG 455; *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297, [1991] 3 All ER 294, CA; *Naughton v O'Callaghan* [1990] 3 All ER 191. However, the equation with fraud for this purpose may be open to challenge before the House of Lords: *Smith New Court (Securities) Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 at 282, [1996] 4 All ER 769 at 792, HL, per Lord Steyn. See also Hooley 'Damages and the Misrepresentation Act 1967' (1991) 107 LQR 547.

<sup>5</sup> *Gran Gelato Ltd v Richcliff Group Ltd* [1992] Ch 560, [1992] 1 All ER 865 (contributory negligence affords defence to action based on the Misrepresentation Act 1967 s 2(1)). Cf *Alliance and Leicester Building Society v Edgestop Ltd* [1994] 2 All ER 38, [1993] 1 WLR 1462 (contributory negligence affords no defence to action for fraud). As to contributory negligence see PARA 876 ante; and NEGLIGENCE vol 78 (2010) PARA 75 et seq.

<sup>6</sup> As to causation see *Smith New Court (Securities) Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, [1996] 4 All ER 769, HL. As to causation in tort see PARA 854 et seq ante; and TORT.

<sup>7</sup> *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, [1969] 2 All ER 119, CA; *Archer v Brown* [1985] QB 401, [1984] 2 All ER 267; *Naughton v O'Callaghan* [1990] 3 All ER 191 at 197 per Waller J; *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297, [1991] 3 All ER 294, CA; *East v Maurer* [1991] 2 All ER 733, [1991] 1 WLR 461, CA;

*Downs v Chappel*[1996] 3 All ER 344, [1997] 1 WLR 426, CA; *Smith New Court (Securities) Ltd v Scrimgeour Vickers (Asset Management) Ltd*[1997] AC 254, [1996] 4 All ER 769, HL. See also PARA 1110 post.

8 *Sharneyford Supplies Ltd v Edge*[1986] Ch 128 at 149, [1985] 1 All ER 976 at 990 per Mervyn Davies J; on appeal [1987] Ch 305 at 323, [1987] 1 All ER 588 at 598, CA, per Balcombe LJ. Cf *Watts v Spence*[1976] Ch 165, [1975] 2 All ER 528; *Errington v Martell-Wilson* (1980) 130 NLJ 545.

9 *Farley Health Products Ltd v Babylon Trading Co Ltd* (1987) Times, 29 July, obiter per Sir Neil Lawson.

10 *Sharneyford Supplies Ltd v Edge*[1986] Ch 128 at 149, [1985] 1 All ER 976 at 990 per Mervyn Davies J (affd [1987] Ch 305, [1987] 1 All ER 588, CA); *Naughton v O'Callaghan*[1990] 3 All ER 191 at 196 per Waller J. Cf *East v Maurer*[1991] 2 All ER 733, [1991] 1 WLR 461, CA (fraud). As to damages for loss of expectation see PARA 977 et seq ante.

11 *Cemp Properties (UK) Ltd v Dentsply Research and Development Corpn*[1989] 2 EGLR 196, [1989] 35 EG 99; *William Sindall plc v Cambridgeshire County Council*[1994] 3 All ER 932 at 963, [1994] 1 WLR 1016 at 1046, CA, obiter per Evans LJ. See further MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 807.

12 *Naughton v O'Callaghan*[1990] 3 All ER 191.

13 *William Sindall plc v Cambridgeshire County Council*[1994] 3 All ER 932, [1994] 1 WLR 1016; *Downs v Chappel*[1996] 3 All ER 344, [1997] 1 WLR 426, CA.

14 *Smith New Court (Securities) Ltd v Scrimgeour Vickers (Asset Management) Ltd*[1997] AC 254, [1996] 4 All ER 769, HL.

15 *Naughton v O'Callaghan*[1990] 3 All ER 191.

16 *Naughton v O'Callaghan*[1990] 3 All ER 191.

17 *Naughton v O'Callaghan*[1990] 3 All ER 191; *William Sindall plc v Cambridgeshire County Council*[1994] 3 All ER 932 at 954-955, [1994] 1 WLR 1016 at 1037-1038, CA, per Hoffmann LJ.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/7. MEASURE OF DAMAGES IN MISREPRESENTATION/1110. Damages in lieu of rescission.

### **1110. Damages in lieu of rescission.**

By statute, the court may award damages in lieu of rescission<sup>1</sup> for a non-fraudulent misrepresentation<sup>2</sup>. Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator can declare the contract subsisting and award damages in lieu of rescission, if of the opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party<sup>3</sup>. The jurisdiction conferred by this provision is discretionary<sup>4</sup>, and may be exercised in favour of confining the misrepresentee to his remedy in damages where there is a substantial imbalance between the loss which the misrepresentee would suffer from the upholding of the contract and the loss which the misrepresenter would suffer from rescission<sup>5</sup>. The measure of damages awarded under this provision is different from, and ordinarily less than, the measure which the statute awards as of right for a non-fraudulent misrepresentation<sup>6</sup>, but the one may operate in reduction of the other<sup>7</sup>. The statutory power to award damages in lieu of rescission may be exercised notwithstanding that a right of rescission has ceased to exist by the time of the proceedings<sup>8</sup>.

1 See *Thomas Witter v TBP Industries Ltd* [1996] 2 All ER 573; Beale 'Points on Misrepresentation' (1995) 111 LQR 385. As to actions for rescission for misrepresentation see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 812 et seq.

2 See the Misrepresentation Act 1967 s 2(2); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 834.

3 See *ibid* s 2(2); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 834.

4 See *ibid* s 2(2); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 834.

5 *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA. See further, as to the factors to be taken into account in the exercise of this discretion, *R v Wheeler* (1990) 92 Cr App Rep 279 at 283, CA, per Stuart-Smith LJ.

6 See the Misrepresentation Act 1967 s 2(1); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 834. See also *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA; and PARA 1109 ante.

7 See the Misrepresentation Act 1967 s 2(3); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 834.

8 *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573; and see Beale 'Points on Misrepresentation' (1995) 111 LQR 385.

### **UPDATE**

### **1110 Damages in lieu of rescission**

NOTE 8--See *Government of Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 WLR 2333.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/8. AGGRAVATION/1111.  
Aggravation by the defendant.

## 8. AGGRAVATION

### 1111. Aggravation by the defendant.

There are two senses in which it can be said that a plaintiff's damage has been aggravated by the defendant.

In the first and strict sense of the word the defendant's motives, conduct or manner of inflicting the injury may have aggravated the plaintiff's damage by injuring his proper feelings of dignity and pride. In tort, but not in contract, the plaintiff can be awarded additional damages, called 'aggravated damages', to compensate him for his injured feelings<sup>1</sup>. Aggravated damages, which are compensatory in nature, are to be distinguished from exemplary damages<sup>2</sup>, which are punitive in nature<sup>3</sup>.

In the second and wider sense of the word the plaintiff may be able to point to aspects of the defendant's conduct which have aggravated or increased his damage, or caused additional heads of damage such as inconvenience. Subject to the rules of remoteness, damages will be assessed by the normal measure of damages appropriate to the case, but such damages are not properly called aggravated damages<sup>4</sup>.

1 *Rookes v Barnard*[1964] AC 1129 at 1221, [1964] 1 All ER 367 at 407, HL, per Lord Devlin; *Cassell & Co Ltd v Broome*[1972] AC 1027 at 1068, [1972] 1 All ER 801 at 821, HL, per Lord Hailsham LC, at 1085 and 836 per Lord Reid, at 1111 and 857 per Viscount Dilhorne, and at 1124, 1130 and 869, 874 per Lord Diplock. As to damages in tort generally see PARA 851 et seq ante.

2 As to exemplary damages see PARA 1115 et seq post. See also *Aggravated, Exemplary and Restitutionary Damages* (Law Com no 247) (1997).

3 *Rookes v Barnard*[1964] AC 1129 at 1221, [1964] 1 All ER 367 at 407, HL, per Lord Devlin; *Cassell & Co Ltd v Broome*[1972] AC 1027, [1972] 1 All ER 801, HL.

4 *Cassell & Co Ltd v Broome*[1972] AC 1027 at 1124, 1126, [1972] 1 All ER 801 at 869, 870, HL, per Lord Diplock. As to remoteness of damage in tort see PARA 851 et seq ante.

## UPDATE

### 1111-1119 Aggravation

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 1111 Aggravation by the defendant

NOTE 4--An award of compensation to an employee for injury to feelings and aggravated damages which is not so excessive as to be irrational, in relation to a single direct act of racial discrimination, is not wrong in principle: *British Telecommunications plc v Reid* [2003] EWCA Civ 1675, [2004] IRLR 327 (racist employee not punished, but promoted, before charges against him determined). In exceptional circumstances, aggravated damages may be awarded in discrimination proceedings where the defence has conducted itself in an excessive and intimidatory manner: *Zaiwalla & Co v Walia*[2002] IRLR 697, EAT.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/8. AGGRAVATION/1112. No aggravated damages for breach of contract.

### **1112. No aggravated damages for breach of contract.**

Aggravated damages may not be awarded in actions for breach of contract. The general rule is that the defendant's motives and conduct are not to be taken into account in assessing damages, and damages are not to be awarded in respect of disappointment or wounded feelings<sup>1</sup>. This is because they are too remote<sup>2</sup>.

Thus, when an employee is wrongly dismissed from his employment the damages to which he is entitled cannot include compensation for the manner of the dismissal, for his injured feelings or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment<sup>3</sup>.

1 *Addis v Gramophone Co Ltd* [1909] AC 488, HL; *O'Laoire v Jackel International (No 2)* [1991] ICR 718, sub nom *O'Laoire v Jackel International Ltd* [1991] IRLR 170, CA. Cf *Malik v Bank of Credit and Commerce International SA* [1997] 3 All ER 1, sub nom *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20, HL.

2 *British Guiana Credit Corp v Da Silva* [1965] 1 WLR 248 at 259, PC (the humiliation, embarrassment and loss of reputation of a dismissed employee were not reasonably foreseeable as liable to result from the breach of contract); *Bliss v South East Thames Regional Health Authority* [1987] ICR 700, [1985] IRLR 308, CA.

3 *Addis v Gramophone Co Ltd* [1909] AC 488, 101 LT 466, HL; *British Guiana Credit Corp v Da Silva* [1965] 1 WLR 248, 109 Sol Jo 30, PC. The rule that an employee cannot obtain compensation in respect of increased difficulty in finding employment has been held not to apply in the case of an apprenticeship agreement which is wrongly terminated; as the object of such an agreement is to enable the apprentice to obtain better employment and wages, he is entitled to damages for diminution of his future prospects by the loss of the benefit of the training for which he has stipulated: *Dunk v George Waller & Son Ltd* [1970] 2 QB 163, [1970] 2 All ER 630, CA. An employee may recover when the employer's bad reputation compromises prospects of future employment: *Malik v Bank of Credit and Commerce International SA* [1997] 3 All ER 1, sub nom *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20, HL (breach of implied term of trust and confidence). As to damages for wrongful dismissal see PARA 1062 ante. As to wrongful dismissal generally see EMPLOYMENT vol 40 (2009) PARA 780 et seq.

## **UPDATE**

### **1111-1119 Aggravation**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/8. AGGRAVATION/1113.  
Breach of contract affecting credit, reputation, convenience or enjoyment.

### **1113. Breach of contract affecting credit, reputation, convenience or enjoyment.**

Although aggravated damages in the sense previously mentioned<sup>1</sup> may not be awarded in actions for breach of contract, substantial damages may be awarded for injury to the plaintiff's credit or reputation, or for inconvenience or loss of enjoyment where the injury, inconvenience or loss was within the presumed contemplation of the parties as likely to result from a breach of contract<sup>2</sup>.

Thus in an action against a banker for refusing to pay a customer's cheques, even though he has the customer's money in hand, damages may be given for injury to the customer's credit<sup>3</sup>. It is necessary to prove that any further damage has in fact been suffered, by way of trading loss<sup>4</sup>.

In an action for breach of contract to sustain the plaintiff's credit substantial damages are recoverable in respect of the injury done to his reputation<sup>5</sup>. The same principle applies in an action against an agent who has his principal's money in hand and refuses or neglects to apply it as directed in honouring the principal's cash orders<sup>6</sup>. Substantial damages may also be awarded where the injury to the plaintiff's credit or reputation is due to loss of publicity of which he has been wrongfully deprived in breach of contract<sup>7</sup>.

There are many situations where damages may be awarded for physical hurt and inconvenience<sup>8</sup>. Furthermore, in contracts to provide entertainment and enjoyment, such as contracts to provide a holiday, damages may (subject to the ordinary constraints)<sup>9</sup> be awarded for loss of enjoyment and the frustration, annoyance and disappointment associated with such loss<sup>10</sup>.

1 See *Malik v Bank of Credit and Commerce International SA* [1997] 3 All ER 1, sub nom *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20, HL (damages for harm to reputation); and PARA 1112 text and note 1 ante.

2 As to contemplation of loss in contract see PARA 1015 et seq ante.

3 *Marzetti v Williams* (1830) 1 B & Ad 415; *Shillibeer v Glyn* (1836) 2 M & W 143; *Rolin v Steward* (1854) 14 CB 595; *Prehn v Royal Bank of Liverpool* (1870) LR 5 Exch 92 at 99 per Kelly CB; *Summers v City Bank* (1874) LR 9 CP 580; *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119, [1996] Bank LR 182, CA. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 832.

4 *Kpohraror v Woolwich Building Society* [1996] 4 All ER 119, [1996] Bank LR 182, CA; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 845.

5 *Wilson v United Counties Bank Ltd* [1920] AC 102, HL (substantial damages awarded to a bank customer whose bankruptcy was caused by the bank's negligent mismanagement of his business in breach of contract properly to supervise that business during the customer's absence on military service); *Vanbergen v St Edmunds Properties Ltd* [1933] 1 KB 345 (revsd on another point [1933] 2 KB 223, CA) (service of a bankruptcy notice in breach of a compromise agreement).

6 *Boyd v Fitt* (1862) 14 ICLR 43; *Larios v Bonany y Gurety* (1873) LR 5 PC 346.

7 *Marb  v George Edwardes (Daly's Theatre) Ltd* [1928] 1 KB 269, CA; *Herbert Clayton and Jack Waller Ltd v Oliver* [1930] AC 209, HL (loss of chance of establishing or enhancing actors' reputations); *Tolnay v Criterion Film Productions Ltd* [1936] 2 All ER 1625, 80 Sol Jo 795; *Miller v Cecil Film Ltd* [1937] 2 All ER 464, 53 TLR 544 (screen credits); *Ackland v World Screenplays* (1950) Times, 23 February; cf *Withers v General Theatre Corp Ltd* [1933] 2 KB 536, CA; *Joseph v National Magazine Co Ltd* [1959] Ch 14, [1958] 3 All ER 52 (author); *Re Golomb* (1931) 144 LT 583, CA (director); *Collier v Sunday Referee Publishing Co Ltd* [1940] 2 KB 647, [1940] 4 All ER 234 (editor); *Moss v Chesham UDC* (1945) 172 LT 301 (surveyor); *Fielding v Moiseiwitsch* (1946) 175 LT 265, CA (impresario). See also *Foaminol Laboratories Ltd v British Artid Plastics Ltd* [1941] 2 All ER 393; *Marcus*

*v Myers* (1895) 11 TLR 327; *Aerial Advertising Co v Batchelors Peas (Manchester) Ltd* [1938] 2 All ER 788; *Anglo-Continental Holidays Ltd v Typaldos Lines (London) Ltd* [1967] 2 Lloyd's Rep 61, CA; *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep 555, CA (harmful publicity). See further *McLeish v Amoo-Gottfried & Co* (1993) Times, 26 July (no damages for loss of reputation but damages for distress caused by loss of reputation).

8 *Summers v Salford Corp'n* [1943] AC 283, [1943] 1 All ER 68, HL; *Bolton v Mahadeva* [1972] 2 All ER 1322 at 1327, [1972] 1 WLR 1009 at 1014, CA, per Cairns LJ (damages awarded for inconvenience during installation of a central heating system); *Hobbs v London and South Western Rly Co* (1875) LR 10 QB 111; *Burton v Pinkerton* (1867) LR 2 Exch 340; *Bailey v Bullock* [1950] 2 All ER 1167; *Buckley v Lane Herdman and Co* [1977] CLY 3143; *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759, [1984] 1 WLR 287 CA; *Elmcroft Developments Ltd v Tankersley-Sawyer* (1984) 15 HLR 63, 270 EG 140, CA; *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 142, CA; *Perry v Sidney Phillips & Son* [1982] 3 All ER 705, [1982] 1 WLR 1297, CA.

9 As to the constraints on recovery of damages see PARA 1015 et seq ante.

10 *Jarvis v Swans Tours Ltd* [1973] QB 233, [1973] 1 All ER 71, CA (winter sports holiday); *Jackson v Horizon Holidays Ltd* [1975] 3 All ER 92, [1975] 1 WLR 1468, CA (plaintiff, who had made a contract for a family holiday abroad on behalf of his family, could recover damages for the discomfort, vexation and upset of all the other members of the family). See also *Piper v Daybell, Court-Cooper & Co* (1969) 210 EG 1047 (compensation for lack of privacy). Cf *Bailey v Bullock* [1950] 2 All ER 1167 (plaintiff awarded damages for inconvenience and discomfort, but not for annoyance and mental distress, in an action in contract against his solicitor for professional negligence); *Cook v S* [1967] 1 All ER 299, [1967] 1 WLR 457, CA (plaintiff's breakdown in health was held to be too remote in an action against her solicitor for professional negligence). But see *Heywood v Wellers* [1976] QB 446, [1976] 1 All ER 300, CA; *Wales v Wales* (1967) 111 Sol Jo 946; *Malyon v Lawrance Messer & Co* [1968] 2 Lloyd's Rep 539, 112 Sol Jo 623. Except, as in the holiday cases, where the object of the contract is to give pleasure, there will be no recovery for distress on breach of contract: *Hayes v James & Charles Dodd (a firm)* [1988] BTLC 380, CA; *Watts v Morrow* [1991] 4 All ER 937, [1991] 1 WLR 1421, CA; *Alexander v Alpe Jack Rolls Royce Motor Cars Ltd* [1996] RTR 95, (1995) Times, 4 May, CA; *Branchett v Beaney, Branchett v Swale Borough Council* [1992] 3 All ER 910, [1992] 28 EG 107, CA (breach of covenant for quiet enjoyment); cf *Ruxley Electronics and Construction v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL (modest sum for loss of amenity allowed on imperfect swimming pool). As to damages in contract for loss of enjoyment and amenity see PARA 957 et seq ante.

## UPDATE

### 1111-1119 Aggravation

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/8. AGGRAVATION/1114.  
Aggravated damages in tort.

### **1114. Aggravated damages in tort.**

In actions in tort, where the damages are at large<sup>1</sup>, the court may take into account the defendant's motives, conduct and manner of committing the tort, and, where these have aggravated the plaintiff's damage by injuring his proper feelings of dignity and pride, aggravated damages may be awarded<sup>2</sup>. The defendant may have acted with malevolence or spite or behaved in a high-handed, malicious, insulting or aggressive manner. The court may consider the defendant's conduct up to the conclusion of the trial, including what he or his counsel may have said at the trial<sup>3</sup>. Such damages cannot be awarded for the tort of negligence<sup>4</sup>. Conversely provocation on the part of the plaintiff may reduce or eliminate aggravated damages in assault and battery<sup>5</sup>.

Aggravated damages are designed to compensate the plaintiff for his wounded feelings; they must be distinguished from exemplary damages which are punitive in nature and which may be awarded only in a limited category of cases<sup>6</sup>.

In cases decided before 1964<sup>7</sup> the distinction between aggravated and exemplary damages was not always appreciated, and the terminology used in such cases is therefore unreliable<sup>8</sup>. It seems, however, that aggravated damages can be awarded in actions where the damages are at large, that is to say where the damages are not limited to the pecuniary loss that can be specifically proved, and in particular in actions of defamation<sup>9</sup>, intimidation<sup>10</sup>, false imprisonment<sup>11</sup>, malicious prosecution<sup>12</sup>, trespass to land<sup>13</sup>, persons<sup>14</sup> or goods<sup>15</sup>, conspiracy<sup>16</sup>, infringement of copyright<sup>17</sup>, deceit<sup>18</sup>, nuisance<sup>19</sup>, unlawful interference with business<sup>20</sup> and abuse of process<sup>21</sup>.

A structured approach to the assessment of aggravated damages has been prescribed for false imprisonment and malicious prosecution. These damages are to compensate for injured feelings when there are aggravating elements rendering a basic compensatory award inadequate. A jury should assess these two awards separately. Aggravated damages should usually exceed a recommended amount but only in exceptional cases where the basic award is modest should they exceed that award and the combined awards should not exceed fair compensation<sup>22</sup>. These principles may apply to other torts<sup>23</sup>.

Quite apart from seeking aggravated damages in the sense used above, the plaintiff is always at liberty to point to aspects of the defendant's conduct which have increased his damage or caused additional heads of damage. Thus in an action for libel the defendant's persistence in a plea of justification or his repetition of the original libel at the trial may increase the damages to which the plaintiff is entitled for injury to reputation<sup>24</sup>.

1    le not limited to the pecuniary loss that can be specifically proved: *Rookes v Barnard* [1964] AC 1129 at 1221, [1964] 1 All ER 367 at 407, HL, per Lord Devlin. See also *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1073, [1972] 1 All ER 801 at 826, HL, per Lord Hailsham LC.

2    *Rookes v Barnard* [1964] AC 1129 at 1221-1226, [1964] 1 All ER 367 at 407-410, HL, per Lord Devlin; *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL. Both mental distress and aggravated damages may be recovered together, covering different aspects of a claim: *Appleton v Garrett* [1996] PIQR 1, 34 BMLR 23. A limited company may recover, though at a lower figure than an individual: *Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397 at 407 per Caulfield J (affd [1984] 1 All ER 293 at 295, CA, per Sir John Donaldson MR) (but see *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 88, [1986] 3 All ER 338 at 380 per Scott J); but a person ignorant of the conduct cannot recover even though it is outrageous: *Alexander v Home Office* [1988] 2 All ER 118, [1988] 1 WLR 968, CA; *Ministry of Defence v Meredith* [1995] IRLR 539 EAT.

3 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1071, [1972] 1 All ER 801 at 824, HL, per Lord Hailsham LC, at 1085 and 836 per Lord Reid, and at 1125 and 870 per Lord Diplock. See also *Pearson v Lemaitre* (1843) 5 Man & G 700; *Praed v Graham* (1889) 24 QBD 53, CA; *Anderson v Calvert* (1908) 24 TLR 399, CA; *Walter v Alltools Ltd* (1944) 171 LT 371, CA; *Alexander v Home Office* [1988] 2 All ER 118, [1988] 1 WLR 968, CA (discrimination); *Warby v Cascarino* (1989) Times, 27 October, CA (false imprisonment); *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153, [1990] 1 All ER 269, CA (defamation); *Marks v Chief Constable of Greater Manchester* (1992) Times, 28 January, CA (malicious prosecution); *Duffy v Eastern Health & Social Services Board* [1992] IRLR 251 (repeated discrimination); *Thompson v Metropolitan Police Comr* [1998] QB 498, [1997] 2 All ER 762, CA (malicious prosecution, false imprisonment). See also the text and note 18 infra. The court may be entitled to look at the plaintiff's conduct: *Cassell & Co Ltd v Broome* supra at 1071 and 824 per Lord Hailsham LC. See also *Kelly v Sherlock* (1866) LR 1 QB 686; *Falvey v Stanford* (1874) LR 10 QB 54 at 56.

4 *Kralj v McGrath* [1986] 1 All ER 54 at 60-61, [1985] NLJ Rep 913 at 913 per Woolf J; *AB v South West Water Services Ltd* [1993] QB 507, [1993] 1 All ER 609, CA. As to negligence generally see NEGLIGENCE.

5 *Lane v Holloway* [1968] 1 QB 379 at 387, [1967] 3 All ER 129 at 131, CA, per Lord Denning MR, and at 392-393 and 134-135 per Salmon LJ. But see *Murphy v Culhane* [1977] QB 94 at 98, [1976] 3 All ER 533 at 535, CA, per Lord Denning MR; *Barnes v Nayer* (1986) Times, 19 December; *Corporacion Nacional del Cobre de Chile v Sogemin Metals Ltd* [1997] 2 All ER 917, [1997] 1 WLR 1396 (contributory negligence not available for torts to which it did not apply before 1945). As to contributory negligence see NEGLIGENCE vol 78 (2010) PARA 75 et seq.

6 As to exemplary damages see PARA 1115 et seq post.

7 See before the judgments in *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL.

8 See *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1068, [1972] 1 All ER 801 at 821, HL, per Lord Hailsham LC.

9 *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL. See also *Praed v Graham* (1889) 24 QBD 53, CA; *Ley v Hamilton* (1935) 153 LT 384, HL (explained in *Rookes v Barnard* [1964] AC 1129 at 1230, 1231, [1964] 1 All ER 367 at 412, 413, HL, per Lord Devlin, and in *Cassell & Co Ltd v Broome* supra at 1075 and 827 per Lord Hailsham LC, and at 1092-1093 and 842 per Lord Reid); *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86, [1964] 3 All ER 947, CA. See also the text and note 18 infra. See generally LIBEL AND SLANDER.

10 *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL; *Messenger Newspaper Group Ltd v National Graphical Association* [1984] IRLR 397 (affd [1984] 1 All ER 293, CA); *Godwin v Uzoigwe* (1992) Times, 18 June, [1992] 31 LS Gaz R 41, CA.

11 *Warwick v Foulkes* (1844) 12 M & W 507; *Walter v Alltools Ltd* (1944) 171 LT 371, CA; *Hook v Cunard Steamship Co Ltd* [1953] 1 All ER 1021 at 1024, [1953] 1 WLR 682 at 685 per Slade J (now subject to *Associated Newspapers Ltd v Dingle* [1964] AC 371, [1962] 2 All ER 737, HL) (comments of judge not to reduce damages); *White v Metropolitan Police Comr* (1982) Times, 24 April; *Smith v Metropolitan Police Comr* [1982] CLY 899; *Warby v Cascarino* (1989) Times, 27 October, CA; *Thompson v Metropolitan Police Comr* [1998] QB 498, [1997] 2 All ER 762, CA. As to false imprisonment generally see TORT.

12 *Leith v Pope* (1779) 2 Wm BI 1327, where the damages were probably intended to be punitive: see *Rookes v Barnard* [1964] AC 1129 at 1223, [1964] 1 All ER 367 at 409, HL, per Lord Devlin. See also *Thompson v Metropolitan Police Comr* [1998] QB 498, [1997] 2 All ER 762, CA; *White v Metropolitan Police Comr* (1982) Times, 24 April; *Marks v Chief Constable Greater Manchester* (1992) Times, 28 January. As to malicious prosecution generally see TORT.

13 *Merest v Harvey* (1814) 5 Taunt 442, where the damages were probably intended to be punitive; *Sears v Lyons* (1818) 2 Stark 317; *Williams v Currie* (1845) 1 CB 841; *Emblen v Myers* (1860) 6 H & N 54; *Massey v Sladen* (1868) LR 4 Exch 13; *Moore v Shelley* (1883) 8 App Cas 285 at 294, PC; *Drane v Evangelou* [1978] 2 All ER 437, [1978] 1 WLR 455, CA; *McMillan v Singh* (1984) 17 HLR 120, CA; *Millington v Duffy* (1984) 17 HLR 232, CA; *Asgar v Ahmed* (1984) 17 HLR 25. As to trespass to land generally see TORT.

14 *W v Meah* [1986] 1 All ER 935; *Ansell v Thomas* [1974] Crim LR 31, CA; *Flavius v Metropolitan Police Comr* (1982) 132 NLJ 532; *Ballard v Metropolitan Police Comr* (1983) 133 NLJ 1133; *Barbara v Home Office* (1984) 134 NLJ 888; *George v Metropolitan Police Comr* (1984) Times, 31 March. See also *Grey v Grant* (1764) 2 Wils 252; *Forde v Skinner* (1830) 4 C & P 239 (pauper complained of an assault in cutting off her hair by force, and the jury was directed that if it were done not for cleanliness but to take down the pauper's pride the damages would be aggravated). As to trespass to persons see TORT.

15 *Owen and Smith (t/a Nuagin Car Service) v Reo Motors (Britain) Ltd* (1934) 151 LT 274, CA; *Piper v Darling* (1940) 67 Ll L Rep 419. As to trespass to goods see TORT.

16 *Huntley v Thornton* [1957] 1 All ER 234, [1957] 1 WLR 321; *Pratt v British Medical Association* [1919] 1 KB 244.

17 *Williams v Settle* [1960] 2 All ER 806, [1960] 1 WLR 1072, CA. The Copyright Act 1956 s 17(3) (repealed) empowered the court in an action for infringement of copyright to award such 'additional damages' as it considered appropriate if, having regard to the flagrancy of the infringement and any benefit from it to the defendant, the court was satisfied that effective relief would not otherwise be available. It seemed that, despite references to 'exemplary damages' in *Williams v Settle* supra, the Copyright Act 1956 s 17(3) (repealed) did not authorise the award of exemplary damages but only of compensatory damages substantially equivalent to aggravated damages at common law: see *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1134, [1972] 1 All ER 801 at 877, HL, per Lord Kilbrandon; *Beloff v Pressdram Ltd* [1973] 1 All ER 241 at 265 per Ungood-Thomas J. The point was left open in *Rookes v Barnard* [1964] AC 1129 at 1225, 1229, [1964] 1 All ER 367 at 409, 410, 412, HL, per Lord Devlin, and in *Cassell & Co Ltd v Broome* supra at 1080, 1081 and 832 per Lord Hailsham LC. The view has been expressed that the Copyright Act 1956 s 17(3) (repealed) left no scope outside its ambit for the award of aggravated damages, or for the award of exemplary damages, in proceedings for infringement of copyright: see *Beloff v Pressdram Ltd* supra. The corresponding provisions of the Copyright, Designs and Patents Act 1988 are s 97(2) (copyright); s 229(3) (designs) and s 191 (performers' rights): see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 419. In *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd (No 2)* [1996] FSR 36 it was thought that additional damages were tantamount to exemplary damages; cf in *Redrow Homes Ltd v Bett Bros plc*, sub nom *Redrow Homes Ltd v Betts Bros plc* 1997 SLT 1125, the Inner House of the Court of Session thought they were aggravated damages. It was left open in *Brugger v Medicaid* [1996] FSR 362; *ZYX Music GmbH v King* [1997] 2 All ER 129, [1997] EMLR 319.

18 *Mafo v Adams* [1970] 1 QB 548, [1969] 3 All ER 1404, CA; *Archer v Brown* [1985] QB 401, [1984] 2 All ER 267. As to the tort of deceit see TORT.

19 *Thompson v Hill* (1870) LR 5 CP 564; *Bone v Seale* [1975] 1 All ER 787, [1975] 1 WLR 797, CA (but comparison with personal injury awards disapproved in *Hunter v Canary Wharf Ltd* [1997] AC 655 at 705-708, [1997] 2 All ER 426 at 451-453, HL, per Lord Hoffmann).

20 *Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397; affd [1984] IRLR 397.

21 *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 [1986] 3 All ER 338 (abuse of Anton Piller order). As to abuse of process see CIVIL PROCEDURE.

22 *Thompson v Metropolitan Police Comr* [1998] QB 498 [1997] 2 All ER 762, CA. Damages should usually exceed £1000: *Thompson v Metropolitan Police Comr* supra.

23 A claim to exemplary damages must be pleaded in the High Court (see RSC Ord 18 r 8(3); and CIVIL PROCEDURE) but a claim to aggravated damages need not. Both types of claim must be pleaded in the County Court (see CCR Ord 6 r 1B; and CIVIL PROCEDURE).

24 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1126, [1972] 1 All ER 801 at 870, HL, per Lord Diplock. The defendant's conduct after publication may also afford cogent evidence of malice in the original publication of the libel and thus evidence on which aggravated damages may be awarded; in effect, therefore, in actions of defamation the boundary between damages, eg for injury to reputation, and aggravated damages is blurred: *Cassell & Co Ltd v Broome* supra. See also note 3 supra.

## UPDATE

### 1111-1119 Aggravation

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 1114 Aggravated damages in tort

NOTE 9--See *Khodaparast v Shad* [2000] 1 All ER 545, [2000] 1 WLR 618, CA (malicious falsehood). Aggravated damages are not available to a corporate claimant in libel proceedings: *Collins Stewart Ltd v Financial Times Ltd* [2005] EWHC 262 (QB), [2006] EMLR 100.



NOTE 14--See *Gerald v Metropolitan Police Comr* (1998) Times, 26 June, CA. In an assault case damages for injury to feelings should be awarded as general rather than aggravated damages: *Richardson v Howie* [2004] EWCA Civ 1127, (2004) Times, 10 September.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/8. AGGRAVATION/1115.  
Exemplary damages; categories of availability.

### **1115. Exemplary damages; categories of availability.**

Exemplary damages are damages which are awarded to punish the defendant and vindicate the strength of the law<sup>1</sup>. They may be awarded only in actions in tort, and only in three categories of cases<sup>2</sup>.

The first category is oppressive, arbitrary or unconstitutional action by servants of the government<sup>3</sup>. It seems that this category is not confined to Crown servants but includes persons who are exercising functions of a governmental character, like the police<sup>4</sup>. This category does not, however, ordinarily<sup>5</sup> extend to oppressive action by private corporations or individuals<sup>6</sup>.

The second category is cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. This category is not confined to money-making in the strict sense but extends to cases (for example, libel<sup>7</sup> or trespass<sup>8</sup>) where the defendant is seeking to gain some object at the plaintiff's expense<sup>9</sup>. However, the mere fact that a tort, particularly a libel, is committed in the course of a business carried on for profit is not sufficient to bring a case within this category<sup>10</sup>.

The third category is cases where exemplary damages are expressly authorised by statute<sup>11</sup>.

1 *Rookes v Barnard* [1964] AC 1129 at 1221, [1964] 1 All ER 367 at 407, HL, per Lord Devlin; *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1077, [1972] 1 All ER 801 at 829, HL, per Lord Hailsham LC. They may not be awarded for any cause of action for which they were not awarded prior to *Rookes v Barnard* supra: *AB v South West Water Services Ltd* [1993] QB 507, [1993] 1 All ER 609, CA.

2 *Rookes v Barnard* [1964] AC 1129 at 1226, [1964] 1 All ER 367 at 410, HL, per Lord Devlin. The categories are also explained in *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL. Their use is barred in contract: see *Addis v Gramophone Co Ltd* [1909] AC 488, HL.

3 See *Rookes v Barnard* [1964] AC 1129 at 1223-1224, [1964] 1 All ER 367 at 407-408, HL, where Lord Devlin cites *Wilkes v Wood* (1763) Lofft 1 (search of house under illegal general warrant; action of trespass); *Huckle v Money* (1763) 2 Wils 205 (arrest under general warrant); and *Benson v Frederick* (1766) 3 Burr 1845 (soldier obtained damages against his colonel who ordered him to be flogged in order to vex a fellow officer). See also *A-G for St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637, [1979] 3 All ER 129, PC; *R v Reading Justices, ex p South West Meat* [1992] Crim LR 672, (1991) 156 JP 284, DC; *Holden v Chief Constable Lancashire Police* [1987] QB 380, [1986] 3 All ER 836, CA. There will be no vicarious liability for a police officer acting outside his authority: *Makanjuola v Metropolitan Police Comr* (1989) Times, 8 August.

4 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1077, [1972] 1 All ER 801 at 829, HL, per Lord Hailsham LC, at 1087 and 838 per Lord Reid, at 1130 and 873 per Lord Diplock, and at 1134 and 877 per Lord Kilbrandon.

5 In *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1078, [1972] 1 All ER 801 at 830, HL, Lord Hailsham LC was not prepared to say without further consideration that a private individual misusing legal powers of private prosecution or arrest as in *Leith v Pope* (1779) 2 Wm BI 1327, where the defendant had the plaintiff arrested on a capital charge, might not at some future date be assimilated into the category mentioned in the text to note 3 supra. This category does not extend to a nationalised utility (see *AB v South West Water Services* [1993] QB 507, [1993] 1 All ER 609, CA) but may to a solicitor executing an Anton Piller order (see *Columbia Picture Industries Inc v Robinson* [1987] Ch 38, [1986] 3 All ER 338). As to Anton Piller orders see CIVIL PROCEDURE vol 11(2009) PARA 402 et seq.

6 *Rookes v Barnard* [1964] AC 1129 at 1226, [1964] 1 All ER 367 at 410, HL, per Lord Devlin; *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1078, [1972] 1 All ER 801 at 830, HL, per Lord Hailsham LC, at 1088 and 838 per Lord Reid, and at 1134 and 877 per Lord Kilbrandon. The fact that the injury to the plaintiff has been aggravated by malice or by the manner in which it is done is not a ground for awarding exemplary damages: *Rookes v Barnard* supra at 1229 and 412 per Lord Devlin, overruling *Loudon v Ryder* [1953] 2 QB 202, [1953] 1 All ER 741, CA. As to the award of aggravated damages in such a case see PARA 1114 ante.

7 See *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL. As to libel see generally LIBEL AND SLANDER.

8 See *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 31, HL, per Lord Cairns LC, and at 34 per Lord Hatherley; *Bulli Coal Mining Co v Osborne* [1899] AC 351, PC (clandestine trespass for minerals; damages without deduction of cost of working); *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1129, [1972] 1 All ER 801 at 873, HL, per Lord Diplock.

9 *Rookes v Barnard* [1964] AC 1129 at 1227, [1964] 1 All ER 367 at 411, HL, per Lord Devlin. See also *Crouch v Great Northern Rly Co* (1856) 11 Exch 742 at 749 obiter per Martin B (possibility of vindictive damages if railway company refused to carry carrier's parcels for purpose of obtaining monopoly); *Bell v Midland Rly Co* (1861) 10 CBNS 287 (obstruction of access to plaintiff's wharf with a view to extinguishing his trade and diverting trade to company's wharf).

10 *Manson v Associated Newspapers Ltd* [1965] 2 All ER 954, [1965] 1 WLR 1038; *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86, [1964] 3 All ER 947, CA; *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523, [1965] 1 WLR 805, CA.

11 *Rookes v Barnard* [1964] AC 1129 at 1227, [1964] 1 All ER 367 at 411, HL, per Lord Devlin who, at 1225 and 410, cited the Law Reform (Miscellaneous Provisions) Act 1934 s 1(2)(a) (substituted by the Administration of Justice Act 1982 s 4(2)) and the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 13(2) (see ARMED FORCES), as Acts which mention exemplary damages by name. Cf however *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1133, [1972] 1 All ER 801 at 876, HL, per Lord Kilbrandon, who thought that in those Acts 'exemplary' meant aggravated and doubted whether any statutory recognition of the doctrine of exemplary damages was to be found. It seems that the Copyright, Designs and Patents Act 1988 s 97(2) (copyright); s 229(3) (designs) and s 191] which refer to 'additional damages' (see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 419), may give a right to award exemplary damages: see *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd (No 2)* [1996] FSR 36 (supports exemplary damages); *Redrow Homes Ltd v Bett Bros plc* 1997 SLT 1125 (Inner House) (supports aggravated damages). As to aggravated damages see PARA 1114 ante.

## UPDATE

### 1111-1119 Aggravation

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 1115 Exemplary damages; categories of availability

TEXT AND NOTES--See *A v Bottrill* [2002] UKPC 44, [2003] 1 AC 449 (accidental personal injury in New Zealand).

NOTE 3--See *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2001] 3 All ER 193 (exemplary damages available against chief constable for oppressive, arbitrary or unconstitutional action by a police constable).

NOTE 9--See also *Design Progression Ltd v Thurlow Properties Ltd* [2004] EWHC 324 (Ch), [2005] 1 WLR 1 (exemplary damages available against landlord who pursued deliberately obstructive policy to prevent assignment of lease and recover premises); and *Borders (UK) Ltd v Metropolitan Police Comr* [2005] EWCA Civ 197, (2005) Times, 15 April (exemplary damages awarded against handler of stolen goods even though compensatory in character and based on quantifiable loss of victim).

NOTE 11--See *Phonographic Performance Ltd v Reader* [2005] EWHC 416 (Ch), [2006] IP & T 1 (expenditure incurred investigating unlawful activities recoverable as additional damages for copyright infringement).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/8. AGGRAVATION/1116.  
Exemplary damages: further constraints on award.

### **1116. Exemplary damages: further constraints on award.**

Exemplary damages will now only be awarded in respect of causes of action for which they were awarded prior to the restatement of the law limiting their award to the three defined categories<sup>1</sup>. This is a further restriction on their award. Torts which satisfy this criterion are assault and battery<sup>2</sup>, defamation<sup>3</sup>, false imprisonment<sup>4</sup>, malicious prosecution<sup>5</sup>, private nuisance<sup>6</sup>, tortious interference with business<sup>7</sup>, trespass to goods<sup>8</sup> and trespass to land<sup>9</sup>. Assault and battery and malicious prosecution qualify when committed by government servants<sup>10</sup>, the remaining torts when committed for gain. Torts which do not satisfy this cause of action criterion include deceit<sup>11</sup>, unlawful discrimination on grounds of sex, race or disability<sup>12</sup>, infringement of patents<sup>13</sup>, public nuisance<sup>14</sup>, breach of European Union law treated as a breach of statutory duty. Damages in respect of equitable wrongs and for breach of an undertaking in damages also do not satisfy this test<sup>15</sup>. In addition to these restrictions the court retains an overriding discretion<sup>16</sup> which has developed a number of guiding principles. Exemplary damages are to be awarded only if the compensatory award is inadequate<sup>17</sup>. For an award the plaintiff must have suffered from punishable behaviour<sup>18</sup> but, equally, provocative<sup>19</sup> or unco-operative<sup>20</sup> conduct on the part of the plaintiff may negate or reduce an award. The fact that the defendant may be subject to criminal or disciplinary proceedings for the same cause may be taken into account in reducing or excluding an award<sup>21</sup> as may the fact that the defendant acted in good faith<sup>22</sup>. The fact that there are multiple plaintiffs, making assessment and apportionment complex, may also be taken into account<sup>23</sup>. The fact that the European Court of Justice has said that local sanctions for breach of European Union law must have real deterrent effect has been held to require full compensatory, not exemplary, damages<sup>24</sup>. Although exemplary damages are punitive, the standard of proof is civil<sup>25</sup>. A claim for such damages must be specifically pleaded<sup>26</sup>. It appears that a claim to exemplary damages may be based on vicarious liability<sup>27</sup> and that it is not contrary to public policy to insure against such a claim<sup>28</sup>. This is clearly so when liability is vicarious<sup>29</sup>.

Where exemplary damages may be awarded the court should ask itself whether the sum it proposes to award as compensatory damages, which may include an element of aggravated damages, is adequate not only for the purpose of compensating the plaintiff but also for the purpose of punishing and deterring the defendant. Only if it is inadequate for the latter purpose should the court consider awarding additional exemplary damages<sup>30</sup>.

The following considerations should be borne in mind: (1) that the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour; (2) that the power to award exemplary damages is a weapon that should be used with restraint; and (3) that the parties' means are relevant<sup>31</sup>.

Exemplary damages may not be awarded in actions for breach of contract<sup>32</sup>.

Where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable may not include any exemplary damages<sup>33</sup> but, except in the case of defamation<sup>34</sup>, such claims survive against the estate of a deceased person.

1 *AB v South West Water Services Ltd* [1993] QB 507, [1993] 1 All ER 609, CA; *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL. As to the three defined categories see PARA 1115 ante.

2 *Benson v Frederick* (1766) 3 Burr 1845. As to assault and battery see TORT.

3 *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL; *Youssouppoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, CA; *Bull v Vazquez* [1947] 1 All ER 334, [1947] LJR 551, CA. As to defamation see generally LIBEL AND SLANDER.

4 *Huckle v Money* (1763) 2 Wils 205; *Leeman v Allen* (1763) 2 Wils 160; *Dumbell v Roberts* [1944] 1 All ER 326, 113 LJB 185, CA. As to false imprisonment see TORT.

5 *Chambers v Robinson* (1726) 2 Stra 691; *Leith v Pope* (1779) 2 Wm BI 1327. Quaere *Thompson v Metropolitan Police Comr* [1998] QB 498, [1997] 2 All ER 762, CA. As to malicious prosecution see TORT.

6 *Bell v Midland Rly Co* (1861) 10 CBNS 287; *Guppys (Bridport) Ltd v Brookling* (1983) 14 HLR 1 at 27, CA, per Stephenson LJ (disconnection of services to tenant).

7 *Pratt v British Medical Association* [1919] 1 KB 244 at 281-282. Quaere *Crouch v Great Northern Rly Co* (1856) 11 Exch 742 at 749 per Martin B; *Bell v Midland Rly Co* (1861) 10 CBNS 287. See further TORT.

8 *Wilkes v Wood* (1763) Lofft 1; *Brewer v Dew* (1843) 11 M & W 625. See further TORT.

9 *Wilkes v Wood* (1763) Lofft 1; *Williams v Currie* (1845) 1 CB 841. As to trespass see TORT.

10 *Benson v Frederick* (1766) 3 Burr 1845 (army officer).

11 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1076, 1130-1131, [1972] 1 All ER 801 at 828 and 874, per Lord Hailsham LC; *Metall und Rohstoff AG v ACLI Metals (London) Ltd* [1984] 1 Lloyds Rep 598 at 612, CA, per Purchas LJ; *Archer v Brown* [1985] QB 401, [1984] 2 All ER 267. Cf *Mafo v Adams* [1970] 1 QB 548, [1969] 3 All ER 1404, CA.

12 *AB v South West Water Services Ltd* [1993] QB 507, [1993] 1 All ER 609, CA (all relevant legislation has been enacted since the decision in *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL), explaining as per incuriam *Bradford City Metropolitan Council v Arora* [1991] 2 QB 507, [1991] 3 All ER 545, CA (where exemplary damages were awarded for discrimination); *Deane v Ealing London Borough Council* [1993] ICR 329, [1993] IRLR 209, EAT. Cf *Alexander v Home Office* [1988] 2 All ER 118, [1988] 1 WLR 968, CA.

13 *Catnic Components Ltd v Hill & Smith Ltd* [1983] FSR 512 at 541 per Falconer J. As to infringement of patents see PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 500 et seq.

14 *AB v South West Water Services Ltd* [1993] QB 507, [1993] 1 All ER 609, CA. As to public nuisance see NUISANCE vol 78 (2010) PARA 105.

15 *AB v South West Water Services Ltd* [1993] QB 507, [1993] 1 All ER 609, CA. In none of these matters was there an award of exemplary damages prior to *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL.

16 *Cassell & Co v Broome* [1972] AC 1027 at 1060, [1972] 1 All ER 801 at 814, HL, per Lord Hailsham LC; *AB v South West Water Services Ltd* [1993] QB 507 at 527-528, [1993] 1 All ER 609 at 624-625, CA, per Stuart-Smith LJ and at 533 and 629 per Sir Thomas Bingham MR.

17 *Rookes v Barnard* [1964] AC 1128 at 1229, [1964] 1 All ER 367 at 411, HL, per Lord Devlin; *Cassell & Co v Broome* [1972] AC 1027 at 1082, [1972] 1 All ER 801 at 834, HL, per Lord Hailsham LC, at 1089 and 839 per Lord Reid, at 1104 and 852-853 per Viscount Dilhorne, at 1116 and 862 per Lord Wilberforce, at 1121-1122 and 866-867 per Lord Diplock, and at 1126 and 877 per Lord Kilbrandon.

18 *Rookes v Barnard* [1964] AC 1129 at 1227, [1964] 1 All ER 367 at 411, HL, per Lord Devlin.

19 *Lane v Holloway* [1968] 1 QB 379 at 387 [1967] 3 All ER 129 at 131-132, CA, per Lord Denning MR and at 392-393 and 134-135 per Salmon LJ; but see *Murphy v Culhane* [1977] QB 94 at 98, [1976] 3 All ER 533 at 535-536, CA, per Lord Denning MR; *Barnes v Nayer* (1986) Times, 19 December, CA; *Holden v Chief Constable of Lancashire* [1987] QB 380, [1986] 3 All ER 836, CA.

20 *Thompson v Metropolitan Police Comr* [1998] QB 498, [1997] 2 All ER 762, CA (non-co-operation did not exclude exemplary damages in this case).

21 *AB v South West Water Services Ltd* [1993] QB 507 at 527, [1993] 1 All ER 609 at 624, CA, per Stuart-Smith LJ (fine imposed was one reason for excluding exemplary damages); *Archer v Brown* [1985] 1 QB 401, [1984] 2 All ER 1404. Criminal or disciplinary proceedings will not affect these damages if they relate to other conduct: *Asghar v Ahmed* (1984) 17 HLR 25.

22 *Holden v Chief Constable of Lancashire* [1987] QB 380, [1986] 3 All ER 836, CA.

23 *AB v South West Water Services Ltd* [1993] QB 507 at 527-528, 531, [1993] 1 All ER 609 at 624-625, 629, CA, per Stuart-Smith LJ.

24 *Ministry of Defence v Meredith* [1995] IRLR 539 EAT; *Ministry of Defence v Cannock* [1995] 2 All ER 449, [1994] ICR 918, EAT. See also *Marshall v Southampton and South West Hampshire Health Authority (No 2)* [1994] QB 126, [1993] 4 All ER 586, ECJ.

25 *John v MGN Ltd* [1997] QB 586, [1996] 2 All ER 35, CA; *Treadaway v Chief Constable West Midlands* (1994) Times, 25 October, though it was stressed in these cases that the more serious the allegation, the more cogent must be the proof. As to the civil standard of proof see CIVIL PROCEDURE vol 11 (2009) PARA 775.

26 See RSC Ord 18 r 8(3); and CIVIL PROCEDURE.

27 Statute imposes vicarious liability on the Crown (eg for prison officers (see the Crown Proceedings Act 1947 s 2(1)(a); and CONSTITUTIONAL LAW AND HUMAN RIGHTS; CROWN PROCEEDINGS AND CROWN PRACTICE); and the police (see the Police Act 1996 s 88(1); the Police Act 1997 ss 42(1), 86(1); and POLICE vol 36(1) (2007 Reissue) PARA 105)) but not for torts outside the course of employment: *Makanjuola v Metropolitan Police Comr* [1992] 3 All ER 617, CA (indecent assault). Similar liability is imposed by the Sex Discrimination Act 1975 s 41, the Race Relations Act 1976 s 32 and the Disability Discrimination Act 1995 s 58 (see DISCRIMINATION vol 13 (2007 Reissue) PARAS 391, 476, 527). There is no clear common law authority but it has been assumed that it does apply: *Racz v Home Office* [1994] 2 AC 45, [1994] 3 All ER 737, HL (prison officer); *Thompson v Metropolitan Police Comr* [1998] QB 498, [1997] 2 All ER 762, CA.

28 It has been held to be contrary to public policy to insure against penalties for crimes: *Askey v Golden Wine Company* [1948] 2 All ER 35 at 38 per Denning J; *Lancashire County Council v Municipal Mutual Insurance Co Ltd* [1996] 3 WLR 493, [1996] 3 All ER 545, CA.

29 *Lancashire County Council v Municipal Mutual Insurance Ltd* [1996] 3 All ER 545 at 555, [1996] 3 WLR 493 at 503, CA, per Simon Brown LJ who appeared to approve insurance against personal as well as vicarious liability but it may be that the distinction is between criminal and merely tortious wrongdoing.

30 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1059, [1972] 1 All ER 801 at 814, HL, per Lord Hailsham LC.

31 *Rookes v Barnard* [1964] AC 1129 at 1227, [1964] 1 All ER 367 at 411, HL, per Lord Devlin.

32 *Addis v Gramophone Co Ltd* [1909] AC 488, HL; *Perera v Vandiyar* [1953] 1 All ER 1109, [1953] 1 WLR 672, CA; *Kenny v Preen* [1963] 1 QB 499, [1962] 3 All ER 814, CA (claims by a lessee for damages for breach of the implied covenant of quiet enjoyment: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 508 et seq). But see now *Malik v Bank of Credit and Commerce International SA* [1997] 3 All ER 1, sub nom *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20, HL (employer may be in breach of implied term not to jeopardise the future of an employee by causing him to become of bad repute).

33 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(2)(a) (as substituted); and EXECUTORS AND ADMINISTRATORS. It is possible that in this enactment 'exemplary damages' means aggravated damages rather than exemplary damages in the true sense: see note 11 supra.

34 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1) (as amended); and EXECUTORS AND ADMINISTRATORS.

## UPDATE

### 1111-1119 Aggravation

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 1116 Exemplary damages: further constraints on award

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement

and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTES 2-10--Misfeasance in public office is a tort which may satisfy the cause of action criterion: *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2001] 2 WLR 1789 (exemplary damages available for oppressive, arbitrary or unconstitutional action by police constable).

NOTE 21--See also *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2007] EWHC 2394 (Ch), [2008] 2 All ER 249 (no need for exemplary damages where deterrence and punishment achieved by a fine in respect of the same legal interest).

NOTE 30--Cf *Borders (UK) Ltd v Metropolitan Police Comr* [2005] EWCA Civ 197, (2005) Times, 15 April (exemplary damages awarded against handler of stolen goods even though compensatory in character and based on quantifiable loss of victim).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/8. AGGRAVATION/1117.  
Assessment of exemplary damages.

### **1117. Assessment of exemplary damages.**

Although in principle exemplary damages are indeterminate<sup>1</sup>, the courts have shown an increasing readiness to provide guidance in arriving at an appropriate amount<sup>2</sup>. Thus awards should be moderate<sup>3</sup>. In defamation cases the freedom of expression provision of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>4</sup> has led the Court of Appeal to intervene to reduce jury awards<sup>5</sup>. The court should take into account the fact that an excessive award may not only infringe the civil liberties of the defendant by imposing a more severe penalty than under criminal law with its greater safeguards for the accused<sup>6</sup> but that in the case of actions against public services, such as the police, a windfall for a plaintiff might be at the expense of financially compromising essential or beneficial services to the public<sup>7</sup>. Juries should be directed to this effect<sup>8</sup>. Further guidance to juries may be given in the form of bracket figures within which the award should be placed<sup>9</sup>, comparisons with awards for personal injuries<sup>10</sup> and substitute awards made by the Court of Appeal<sup>11</sup>. Both the conduct of the plaintiff, if it caused the offensive conduct of the defendant<sup>12</sup>, and the good faith of the defendant are relevant to the amount<sup>13</sup> as well as the existence of liability. When there are multiple defendants the award must be restricted to an amount appropriate to the defendant least responsible for the tort<sup>14</sup>. When there are multiple plaintiffs a single sum must be awarded to be divided equally between them<sup>15</sup>. The ability of the defendant to pay should be taken into account<sup>16</sup> and in a case involving vicarious liability only the means of the employer are relevant<sup>17</sup>. The possibility of such an employer enforcing an indemnity against an impecunious employee could be avoided by appropriate use of contribution<sup>18</sup>.

1 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1087, [1972] 1 All ER 801 at 838, HL, per Lord Reid.

2 See *Aggravated, Exemplary and Restitutionary Damages* (Law Com no 247) (1997) pp 72-88.

3 *Rookes v Barnard* [1964] AC 1129 at 1227, [1964] 1 All ER 367 at 411, HL, per Lord Devlin.

4 The Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 10.

5 *Rantzen v MGN* [1994] QB 670, [1993] 4 All ER 975, CA; *John v MGN* [1997] QB 586, [1996] 2 All ER 35, CA (exemplary damages expressly considered). See also *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442 (European Court of Human Rights held that a large award of compensatory damages coupled with inadequate guidance to the jury did infringe the Convention for the Protection of Human Rights and Fundamental Freedoms: see note 4 supra). The Courts and Legal Services Act 1990 s 8(2) and RSC Ord 59 r 11(4) allow the Court of Appeal to substitute its own figure when the jury award is excessive.

6 *Rookes v Barnard* [1964] AC 1129 at 1227, [1964] 1 All ER 367 at 411, HL, per Lord Devlin.

7 *Thompson v Metropolitan Police Comr* [1998] QB 498, [1997] 2 All ER 762, CA.

8 *Thompson v Metropolitan Police Comr* [1998] QB 498, [1997] 2 All ER 762, CA.

9 *John v MGN Ltd* [1997] QB 586 at 615-616, [1996] 2 All ER 35 at 55, CA, per Sir Thomas Bingham MR. This allowed both judge and counsel to suggest figures and in a defamation case make comparisons with personal injury awards. But see *Thompson v Metropolitan Police Comr* [1998] QB 498, [1997] 2 All ER 762, CA (in false imprisonment and malicious prosecution indication that the judge should hear counsel in the absence of the jury and on their return suggest basic and ceiling figures though these are to be mere guidelines; these damages are unlikely to be less than £5,000; £25,000 might be appropriate for a bad case and £50,000 should be the absolute maximum for a case involving a senior officer).

10 *John v MGN Ltd* [1997] QB 586 at 612-614, [1996] 2 All ER 35 at 55, CA, per Sir Thomas Bingham MR. As to damages for personal injury see PARA 878 et seq ante.



11 *Rantzen v MGN* [1994] QB 670, [1993] 4 All ER 975, CA, was reconsidered on guidance on quantum for juries in *John v MGN Ltd* [1997] QB 586 at 615-616, [1996] 2 All ER 35 at 55, CA, per Sir Thomas Bingham MR. Ordinary jury awards may not be used but jury awards approved by the Court of Appeal may be put to juries but only as guidelines.

12 *Lane v Holloway* [1968] 1 QB 379 at 387, [1967] 3 All ER 129 at 131-132, CA, per Lord Denning MR, and at 390-392 and 134-135 per Salmon LJ. But see *Murphy v Culhane* [1977] QB 94 at 98, [1976] 3 All ER 533 at 535, CA, per Lord Denning MR; *Thompson v Metropolitan Police Comr* [1998] QB 498, [1997] 2 All ER 762, CA.

13 *Holden v Chief Constable of Lancashire* [1987] QB 380, [1986] 3 All ER 836, CA.

14 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1063, [1972] 1 All ER 801 at 817, HL, per Lord Hailsham LC.

15 *Riches v News Group Newspapers Ltd* [1986] QB 256, [1985] 2 All ER 845, CA.

16 *Rookes v Barnard* [1964] AC 1129 at 1227, [1964] 1 All ER 367 at 411, HL, per Lord Devlin.

17 *Thompson v Metropolitan Police Comr* [1998] QB 498, [1997] 2 All ER 762, CA.

18 *Thompson v Metropolitan Police Comr* [1998] QB 498, [1997] 2 All ER 762, CA. See the Civil Liability (Contribution) Act 1978 s 2(1), (2) (see PARA 844 ante) empowering the court to order just and equitable contribution, a complete indemnity or complete exemption. As to contribution and apportionment see PARA 837 ante.

## UPDATE

### 1111-1119 Aggravation

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/8. AGGRAVATION/1118. Joint tortfeasors.

**1118. Joint tortfeasors.**

In a joint tort the damages awarded to a plaintiff cannot be severed and each and all of the defendants, whether sued together or separately, are jointly liable for whatever sum is awarded even though one may be more blameworthy than another. Any question of contribution among themselves is another matter<sup>1</sup>.

In a case where exemplary damages may be awarded it would be unfair to punish one joint defendant by reference to the conduct of a more guilty joint defendant. Any exemplary damages awarded must therefore represent the lowest sum for which any of the defendants could be held liable<sup>2</sup>.

It seems that the same rule applies to aggravated damages<sup>3</sup>.

1 As to contribution between tortfeasors with regard to responsibility for damage see the Civil Liability (Contribution) Act 1978 ss 1, 2; para 837 et seq ante.

2 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1063, [1972] 1 All ER 801 at 817, HL, per Lord Hailsham LC, at 1090 and 840 per Lord Reid, at 1096 and 845 per Lord Morris, and at 1105 and 852 per Lord Dilhorne.

3 *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1063, [1972] 1 All ER 801 at 817, HL, per Lord Hailsham LC. As to aggravated damages see PARA 1114 ante.

**UPDATE**

**1111-1119 Aggravation**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/8. AGGRAVATION/1119.  
Aggravation by the plaintiff.

### 1119. Aggravation by the plaintiff.

If a person suffering from a tort in respect of which he claims damages retards his recovery or rehabilitation by careless or unreasonable conduct he cannot claim damages for injuries or loss consequent on that conduct<sup>1</sup>. He is not to be expected to act with perfect knowledge and ideal wisdom<sup>2</sup>, but he cannot recover damages for such injuries as are due to his own unreasonable conduct<sup>3</sup>. If, however, what he does reasonably and carefully augments his injuries, that may be regarded as a natural consequence of the accident<sup>4</sup>.

In this context questions of causation and of remoteness of damage frequently arise<sup>5</sup>. If a plaintiff who has been injured by the defendant's tort acts unreasonably, whereby he suffers a second injury, even though that injury would not have occurred but for the original injury, damages will not be recoverable from the defendant in respect of the second injury<sup>6</sup>. This is because the plaintiff's unreasonable conduct is a novus actus interveniens which breaks the chain of causation<sup>7</sup>. If, however, he has acted reasonably and the risk of such further injury was foreseeable, damages will be recoverable in respect of it<sup>8</sup>.

If a plaintiff suffers injury or loss when taking the natural and appropriate steps to deal with a situation created by the defendant's tort, that injury or loss may form part of the damage caused by the tort even though it would not have occurred but for the plaintiff's own intervention<sup>9</sup>.

1 *McAuley v London Transport Executive* [1957] 2 Lloyd's Rep 500, CA; *Marcroft v Scruttons Ltd* [1954] 1 Lloyd's Rep 395, CA (refusal to undergo recommended medical treatment); (but see *Brice v Brown* [1984] 1 All ER 997, NLJ 204); *James v Woodall Duckham Construction Co Ltd* [1969] 2 All ER 794, [1969] 1 WLR 903, CA (plaintiff had a functional overlay, ie suffered from pain for which there was no physical cause, and was advised by his doctors that his symptoms would not clear until his action had been settled, yet delayed beginning proceedings and failed to pursue the action diligently); *McKew v Holland and Hannen and Cubitts (Scotland) Ltd* [1969] 3 All ER 1621, 8 KIR 921, HL. See also *The Flying Fish* (1865) 34 LJP 113, PC; *Grant v SS Egyptian* [1910] AC 400, HL; *The Glendinning* (1943) 76 Ll L Rep 86; *Rushton v Turner Bros Asbestos Co* [1959] 3 All ER 517, [1960] 1 WLR 96; *The Pacific Concord* [1961] 1 All ER 106, [1961] 1 WLR 873; *The Fritz Thyssen* [1968] P 255, [1967] 3 All ER 117, CA.

2 *Jones v Watney, Combe, Reid & Co Ltd* (1912) 28 TLR 399.

3 *McKew v Holland and Hannen and Cubitts (Scotland) Ltd* [1969] 3 All ER 1621, 8 KIR 921, HL. See also *Ansett v Marshall* (1853) 22 LJB 118 (expense of remaining in England to sue defendant for breach of contract of carriage not allowed as damages).

4 *Bloor v Liverpool Derricking and Carrying Co Ltd* [1936] 3 All ER 399, CA (unexpected death under anaesthetic); *Hales v London and North Western Rly Co* (1863) 4 B & S 66 (expense of unsuccessful search for goods delayed in delivery). See also *The City of Lincoln* (1889) 15 PD 15; *Canadian Pacific Rly Co v Kelvin Shipping Co Ltd* (1927) 138 LT 369, HL; *Dee Conservancy Board v McConnell* [1928] 2 KB 159, CA; *The Genua* [1936] 2 All ER 798, 155 LT 456; *The Magnolia* [1955] 1 Lloyd's Rep 417; *Temple Bar (Owners) v Guildford (Owners)*, *The Guildford* [1956] P 364, [1956] 2 All ER 915; *Sayers v Harlow UDC* [1958] 2 All ER 342, [1958] 1 WLR 623, CA; *The Lucille Bloomfield* [1967] 2 All ER 633n, [1967] 1 WLR 697n, CA; *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012, [1984] 3 All ER 1044, CA. Such cases may involve contributory negligence: see *Sayers v Harlow UDC* supra and *The Calliope* [1970] P 172, [1970] 1 All ER 624. As to contributory negligence see PARA 876 ante; and NEGLIGENCE vol 78 (2010) PARA 75 et seq.

5 As to the concept of remoteness see PARA 851 et seq ante.

6 *McKew v Holland and Hannen and Cubitts (Scotland) Ltd* [1969] 3 All ER 1621, 8 KIR 921, HL (plaintiff whose leg had been injured by the defendant's negligence attempted, without assistance, to descend a steep staircase without a handrail, although his leg had previously given way on occasions, and fell and injured his ankle).

7 *McKew v Holland and Hannen and Cubitts (Scotland) Ltd* [1969] 3 All ER 1621, 8 KIR 921 at 1623 and 923, HL, per Lord Reid and at 1626 and 926 per Lord Guest, HL. For a case where the suicide of an injured person was held to have been due to neurosis arising from the injury and not to constitute a novus actus see *Pigney v Pointers Transport Services Ltd* [1957] 2 All ER 807, [1957] 1 WLR 1121; but see *Hyde v Tameside Area Health Authority* [1981] CLY 1854, CA; *Swami v Lo* (1979) 105 DLR (3d) 451. There may be a duty to guard against it: *Kirkham v Anderton* [1990] 2 QB 283, [1990] 3 All ER 246, CA; *Reeves v Metropolitan Police Comr* [1998] 2 All ER 381, [1998] 2 WLR 401, CA. As to causation in tort see PARA 854 ante.

8 *Wieland v Cyril Lord Carpets Ltd* [1969] 3 All ER 1006 (plaintiff who had been injured by the defendant's negligence was fitted with a cervical collar but fell while descending stairs because she was unable to use her bifocal spectacles with her usual skill).

9 *Jones v Boyce* (1816) 1 Stark 493; *The City of Lincoln* (1889) 15 PD 15; *Canadian Pacific Rly v Kelvin Shipping Co* (1927) 138 LT 369, HL; *Dee Conservancy v McConnell* [1928] 2 KB 159, CA; *The Genua* [1936] 2 All ER 798, 155 LT 456; *Emeh v Kensington and Chelsea and Westminster Area Health Authority* [1985] QB 1012, [1984] 3 All ER 1044, CA; *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651, [1992] PIQR Q50.

## UPDATE

### 1111-1119 Aggravation

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### 1119 Aggravation by the plaintiff

NOTE 6--Where the unreasonableness of the claimant's conduct is not sufficient to break the chain of causation, it may still be appropriate to reduce damages for the second injury accordingly: *Spencer v Wincanton Holdings Ltd* [2009] EWCA Civ 1404, [2010] PIQR P166, [2009] All ER (D) 194 (Dec).

NOTE 7--*Reeves*, cited, affirmed in part: [1999] 3 All ER 897, HL.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/9. DAMAGES IN EQUITY/1120. The historical development of equity's jurisdiction to award damages.

## 9. DAMAGES IN EQUITY

### 1120. The historical development of equity's jurisdiction to award damages.

In general, the power to award damages historically fell within the province of the common law<sup>1</sup>. In the sixteenth and seventeenth centuries the Court of Chancery began to award damages in some cases where no remedy at law was available<sup>2</sup>, though the term 'damages' was used in various senses<sup>3</sup>. The Court of Chancery exercised jurisdiction to ascertain damages or compensation by directing an issue, quantum damnificatus<sup>4</sup>, or by a reference to a master or chief clerk<sup>5</sup>, the more usual course being to direct an issue to be tried by jury<sup>6</sup>.

By the eighteenth century the Court of Chancery was awarding damages in appropriate cases<sup>7</sup>. In the first half of the nineteenth century it was assessing damages in administration suits rather than insisting on the creditor recovering damages at law<sup>8</sup>. Though the court had awarded damages where it was impossible to decree specific performance of the sale of land by reason of the seller's misconduct in selling the land to another<sup>9</sup>, this advance was repudiated by Lord Eldon in 1810<sup>10</sup>. Thereafter the Court of Chancery declined to award damages where a buyer was unable to secure specific performance of a contract relating to land<sup>11</sup>, where there was a defect in the seller's title<sup>12</sup>, or for the misconduct of a solicitor<sup>13</sup>.

Although some commentators considered<sup>14</sup> that the Court of Chancery had no power to award damages before the Chancery Amendment Act 1858 (Lord Cairns' Act), an alternative view<sup>15</sup> is that courts of equity have always had the power to award damages but considered it ordinarily undesirable to do so<sup>16</sup>. Discussion of the question has been obscured by the failure to distinguish between equity's power to award damages and its inherent jurisdiction to award equitable compensation for breach of an equitable duty such as fiduciary duty<sup>17</sup>.

1 *Wiseman v Roper* (1645-1646) 1 Rep Ch 158; *Ranelagh v Hayes* (1683) 1 Vern 189 at 190.

2 Tothill *Transactions of the High Court of Chancery by Practice and Precedent; Damages* (1588-1640) 21 ER at 52.

3 See McDermott *Equitable Damages* (2nd Edn, 1994) pp 10-11.

4 *Ranelagh v Hayes* (1683) 1 Vern 189 at 190; *City of London v Nash* (1747) 3 Atk 512 at 516-517.

5 Yale *Lord Nottingham's Chancery Cases* Vol II Selden Society (vol 79, 1961) Introduction p 15 note; Jackson *The History of Quasi-Contract in English Law* (1936) p xiii. See also *Denton v Stewart* (1786) 17 Ves 276n; *Greenaway v Adams* (1806) 12 Ves 395.

6 *Phillips v Thompson* (1814) 1 Johns Ch 130 at 151.

7 *Lannoy v Werry* (1717) 4 Bro Parl Cas 630 at 634, HL. See also *Martyn v Blake* (1842) 3 Dr & War 125.

8 *Sutton v Mashiter* (1829) 2 Sim 513; *Cox v Barnard* (1850) 8 Hare 310.

9 *Denton v Stewart* (1786) 17 Ves 276n; *Greenaway v Adams* (1806) 12 Ves 395 at 401-402; cf *Gwillim v Stone* (1807) 14 Ves 128 at 129, where doubt was expressed about the award of damages in equity.

10 *Todd v Gee* (1810) 17 Ves 273.

11 *Blore v Sutton* (1817) 3 Mer 237 at 238; *Sainsbury v Jones* (1839) 5 My & Cr 1 at 3-4; *Aberaman Ironworks v Wickens* (1868) LR 5 Eq 485 at 514-515.

12 *Williams v Higden* (1828) Coop Pr Cas 500.

13 *Tylee v Webb* (1851) 14 Beav 14 at 16.

14 1 Fonblanque *A Treatise of Equity* (5th Edn, 1820) p 44; 1 Bacon *New Abridgement of the Law* (7th Edn, 1832) p 134.

15 *Phelps v Prothero* (1855) 7 De GM & G 722 at 734; *Gedye v Duke of Montrose* (1858) 26 Beav 45 (the award seems to have been for damages, though it was made under a prayer for compensation).

16 *Minter v Geraghty* (1981) 38 ALR 68 at 80; *Day v Mead* [1987] 2 NZLR 443 at 450; and see Spry *Equitable Remedies* (5th Edn, 1990) p 608; Ingman and Wakefield 'Equitable Damages under Lord Cairns' Act' [1981] Conv 286 at 387. For a history of the Court of Chancery's power to award damages see generally McDermott *Equitable Damages* (2nd Edn, 1994); see also *Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA.

17 As to the inherent jurisdiction to award equitable compensation for breach of equitable duty see *Swindle v Harrison* [1997] 4 All ER 705, (1997) Times 17 April, CA; *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92; *Re Dawson* [1966] 2 NSW 211; *Concept Television Productions Pty Ltd v Australian Broadcasting Corpn* (1988) 12 IPR 129 at 136, Aust FC, per Gummow J; *Smith Kline and French Laboratories (Australia) v Secretary Department of Community Services & Health* (1990) 17 IPR 545 at 556 per Gummow J; see also Gummow *Compensation for Breach of Fiduciary Duty* in Youdan *Equity, Fiduciaries and Trusts* (1989) p 57 et seq; and PARA 1130 post.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/9. DAMAGES IN EQUITY/1121. The Chancery Amendment Act 1858 and the Supreme Court Act 1981.

### **1121. The Chancery Amendment Act 1858 and the Supreme Court Act 1981.**

The Chancery Amendment Act authorised the Court of Chancery to award damages (subsequently referred to as 'equitable damages'), either in addition to or in substitution for an injunction or decree of specific performance<sup>1</sup>. The Act enabled the court, when refusing equitable relief, to award the plaintiff damages, instead of leaving the plaintiff to his remedy in the common law courts<sup>2</sup>. It also enabled the court to award damages where there was no cause of action at law<sup>3</sup>. Thus, the Court of Chancery, and later the High Court, could award damages in substitution for an injunction, for prospective loss in a quia timet case where injury is merely threatened and no wrongful act has been committed<sup>4</sup>.

The Court of Chancery would not award damages where a plaintiff had no entitlement to equitable relief, but would dismiss a suit without prejudice to an action at law<sup>5</sup>. The jurisdiction conferred by the Act was discretionary<sup>6</sup>. Despite the repeal of the Chancery Amendment Act<sup>7</sup>, the High Court continued to exercise jurisdiction to award equitable damages under the Act<sup>8</sup>.

The Supreme Court Act 1981<sup>9</sup> now confers jurisdiction on the Court of Appeal and the High Court to award equitable damages. Such damages may be awarded where the court has jurisdiction to entertain an application for an injunction or specific performance<sup>10</sup>. The High Court also has power<sup>11</sup>, under its general jurisdiction, to award damages to a party who has been injured, either in addition to or in substitution for an injunction<sup>12</sup>. The power to award equitable damages is not as restricted as it was under the Chancery Amendment Act<sup>13</sup>.

1    Ie by virtue of the Chancery Amendment Act 1858 s 2 (repealed).

2    *Ferguson v Wilson* (1866) 2 Ch App 77; *Jaggard v Sawyer* [1995] 2 All ER 189 at 204, [1995] 1 WLR 269 at 284, CA, per Millett LJ.

3    *Eastwood v Lever* (1863) 4 De GJ and Sm 114 at 128; *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL; *Wrotham Park Estates Co Ltd v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798; *Price v Strange* [1978] Ch 337, [1977] 3 All ER 371, CA; *Jaggard v Sawyer* [1995] 2 All ER 189 at 204, [1995] 1 WLR 269 at 284, CA, per Millett LJ.

4    *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, [1924] All ER 259, HL. A court of common law could not award damages for prospective injury: *Leeds Industrial Co-operative Society Ltd v Slack* supra at 856-857 and 262 per Viscount Finlay. Damages could also be awarded in substitution for specific performance in a case of part performance where damages at law could not be awarded by reason of the Statute of Frauds: *Price v Strange* [1978] Ch 337 at 358, [1977] 3 All ER 371 at 384-385, CA, per Goff LJ, or for breach of restrictive covenant: *Wrotham Park Estates Co Ltd v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798; see McDermott *Equitable Damages* (2nd Edn, 1994) pp 172-183; EQUITY vol 16(2) (Reissue) PARA 628.

5    *Collins v Stuteley* (1859) WR 710; *Clarkson v Edge* (1863) 12 WR 518; *Lawrence v Austin* (1865) 13 WR 981; *Robson v Whittingham* (1866) 1 Ch App 442.

6    *Anglo-Danubian Co v Rogerson* (1867) LR 4 Eq 3 at 8 per Romilly MR; *Acraman v Price* (1870) 18 WR 540. The exercise of the discretion depended upon the circumstances of the case: *Greenwood v Hornsey* (1886) 33 ChD 471 at 476-477. See PARA 1123 post.

7    Ie by virtue of the Statute Law Revision and Civil Procedure Act 1883 (repealed). This repeal did not affect the jurisdiction established by the Chancery Amendment Act 1858: see the Statute Law Revision and Civil Procedure Act 1883 s 5. By savings and the Supreme Court Act 1981 s 19, which vested the jurisdiction of the Court of Chancery in the High Court, the jurisdiction conferred by the Chancery Amendment Act 1858 s 2 remains in force: *Dreyfus v Peruvian Guano Co* (1889) 42 ChD 66 at 73; *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851 at 861-863, HL; see also *Holland v Worley* (1884) 26 ChD 578; *Serrao v Noel* (1885) 15 QBD 549, CA, *Greenwood v Hornsey* (1886) 33 ChD 471; *Chapman, Morsons & Co v Auckland Union Guardians* (1889) 23 QBD 294, CA; *Dicker v Popham, Radford & Co* (1890) 63 LT 379; *Shelfer v City of London*

*Electric Lighting Co, Meux's Brewery Co v City of London Electric Lighting Co* [1895] 1 Ch 287, CA; *Cowper v Laidler* [1903] 2 Ch 337.

8 *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897; *Hooper v Rogers* [1975] Ch 43, [1974] 3 All ER 417, CA; *Dutton v Spink and Beeching (Sales) Ltd* [1977] 1 All ER 287, CA; *Price v Strange* [1978] Ch 337, [1977] 3 All ER 371, CA; *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL; *Kennaway v Thompson* [1981] QB 88, [1980] 3 All ER 329, CA; *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197, [1981] 3 All ER 667; see Jolowicz 'Damages in Equity - A Study of Lord Cairns' Act' [1975] 34 CLJ 224 at 229.

9 See the Supreme Court Act 1981 s 50. The power is extended to county courts by the County Courts Act 1984 ss 23, 38 (substituted by the Courts and Legal Services Act 1990 s 3).

10 'Jurisdiction' is defined to include 'powers': Supreme Court Act 1981 s 151(1).

11 See *ibid* s 49.

12 It is therefore no longer necessary in such a case to resort to the Chancery Amendment Act 1858 s 2 (repealed). See *Sayers v Collyer* (1884) 28 ChD 103, CA; *Serrao v Noel* (1885) 15 QBD 549, CA.

13 The authority to award damages under the Chancery Amendment Act s 2 (repealed) in addition to or in substitution for an injunction to restrain a non-contractual breach was restricted to injunctions 'against the commission or continuance of any wrongful act'. An injunction to restrain an improper action at law was held not to be an injunction to restrain the continuance of a wrongful act: *Acraman v Price* (1870) 18 WR 540.

It is no longer necessary for the plaintiff to make out that he is entitled to an equitable remedy before he can obtain damages: *Elmore v Pirrie* (1887) 57 LT 333 at 335. In a purely equitable claim damages may be recoverable even though the right to equitable relief has been lost by acquiescence: *Landau v Curton* (1962) 184 EG 13, [1962] EGD 369.

## UPDATE

### 1121 The Chancery Amendment Act 1858 and the [Senior Courts] Act 1981

NOTES 7, 9, 10--Supreme Court Act 1981 now cited as Senior Courts Act 1981:  
Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/9. DAMAGES IN EQUITY/1122. The existing jurisdiction to award equitable damages.

### **1122. The existing jurisdiction to award equitable damages.**

The existence of a title to equitable relief is the foundation of a claim to equitable damages<sup>1</sup>. Despite statements that under the Chancery Amendment Act damages could be awarded only if the court could order an injunction or specific performance at the hearing<sup>2</sup>, it is sufficient if the plaintiff has a title to equitable relief when the proceedings are commenced<sup>3</sup>. There is strong support for the proposition that the jurisdiction to grant equitable relief must exist when the proceedings are commenced<sup>4</sup>. The question is whether at that time the court could have granted equitable relief, not whether it would have done so<sup>5</sup>. Although it was suggested that, under the Act, damages could only be awarded contemporaneously with the grant of an injunction or a decree for specific performance<sup>6</sup>, if such relief was granted, that suggested limitation has no basis in the Supreme Court Act 1981<sup>7</sup>.

The jurisdiction is not confined to the award of such damages as could have been awarded at common law<sup>8</sup>, though equitable damages may include such damages<sup>9</sup>. There are some differences between the two types of damages: they may be awarded for prospective loss in a quia timet case in substitution for an injunction<sup>10</sup>, for damage arising after the issue of the writ<sup>11</sup>, or even for prospective loss after judgment<sup>12</sup>, and for breach of a restrictive covenant to which the plaintiff is not a party<sup>13</sup>.

In those cases in which a plaintiff who seeks to enforce a restrictive covenant is not in a contractual relationship with the defendant, an award of damages can be made only under the statutory jurisdiction<sup>14</sup>. In other cases, because a threatened breach of a negative covenant will be restrained by injunction<sup>15</sup>, damages may be recovered at common law or under the statutory jurisdiction<sup>16</sup>.

Equitable damages are awarded at the discretion of the court<sup>17</sup>. Under the Chancery Amendment Act the Court of Chancery had a discretion in whether or not to award damages and in the amount awarded<sup>18</sup>. The exercise of the discretion depended upon the circumstances of the particular case. The Supreme Court Act 1981 continues the discretionary nature of the jurisdiction<sup>19</sup> but the measure of damages recoverable at common law and under the Supreme Court Act is the same in respect of the same cause of action<sup>20</sup>. The court may award damages where formerly it would have granted specific relief<sup>21</sup>. Equitable damages are also subject to equitable defences<sup>22</sup>. Equitable damages may, however, be awarded where specific equitable relief is refused on discretionary grounds<sup>23</sup>.

<sup>1</sup> For a discussion of the situations in which a plaintiff has failed to make out a title to equitable relief see McDermott *Equitable Damages* (2nd Edn, 1994) pp 57-59.

<sup>2</sup> *Chinnock v Sainsbury* (1860) 9 WR 7; *De Brassac v Martyn* (1863) 11 WR 1020; *Allen v Fairbrother* (1907) 9 GLR 328.

<sup>3</sup> *Ferguson v Wilson* (1866) 2 Ch App 77 at 89, CA, per Turner LJ, and at 91 per Cairns LJ; *White v Boby* (1877) 37 LT 652.

<sup>4</sup> *Durell v Pritchard* (1865) 1 Ch App 244 at 251 per Turner LJ; *Ferguson v Wilson* (1866) 2 Ch App 77 at 88 per Turner LJ; *Lavery v Pursell* (1888) 39 ChD 508; *Jaggard v Sawyer* [1995] 2 All ER 189 at 205, [1995] 1 WLR 269 at 284-285, CA, per Millett LJ; cf Meagher, Gummow and Lehane *Equity - Doctrines and Remedies* (3rd Edn, 1992) para 642; Spry *Equitable Remedies* (4th Edn, 1990) p 617; McDermott *Equitable Damages* (2nd Edn, 1994) pp 82-83. The authors express the view that it is sufficient if jurisdiction exists at the time of the hearing to grant equitable relief. It seems that equitable damages may be claimed, for example, where the action was begun before the contractual date for completion: see also *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197 at 202-203, [1981] 3 All ER 667 at 669-670 per Davies J.

5 *City of London Brewery Co v Tennant* (1873) 9 Ch App 212; *Hooper v Rogers* [1975] Ch 43, [1974] 3 All ER 417. But equitable damages will not be awarded where performance of the contract has become impossible before the writ is issued: *Mama v Sassoon* (1928) 55 IA 360 at 374, PC; *Jaggard v Sawyer* [1995] 2 All ER 189 at 205, [1995] 1 WLR 269 at 285, CA, per Millett LJ; *Ferguson v Wilson* (1866) 2 Ch App 77; *Hipgrave v Case* (1885) 28 ChD 356, CA.

6 *Biggin v Minton* [1977] 2 All ER 647, [1977] 1 WLR 701. The suggestion was based on the Chancery Amendment Act 1858 s 2 (repealed) that it is lawful for the same court to award damages.

7 *le* by virtue of the Supreme Court Act 1981 s 50.

8 *Eastwood v Lever* (1863) 4 De GJ & Sm 114 at 128; *Crabb v Arun District Council (No 2)* (1976) 121 Sol Jo 86, CA, per Denning MR; *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 678, PC. In *Johnson v Agnew* [1980] AC 367 at 400, [1979] 1 All ER 883 at 896, HL, per Lord Wilberforce, it was held that the measure of damages is the same whether damages are recoverable at common law or under the Act. This was followed in *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA. But it has been held that the statement must be taken to be limited to the case where they are recoverable in respect of the same cause of action: *Jaggard v Sawyer* [1995] 2 All ER 189 at 211, [1995] 1 WLR 269 at 290-291, CA, per Millett LJ.

9 *Chatfield v Jones* [1990] 3 NZLR 285 at 290 per Cooke P.

10 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL.

11 *Davenport v Rylands* (1865) LR 1 Eq 302 at 308 per Page Wood VC; *Fritz v Hobson* (1880) 14 ChD 542 at 547 per Fry J; *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 219 per Greene MR.

12 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851; *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 219 per Greene MR. This is a consequence of the award of equitable damages in substitution for specific relief.

The extension which enables common law damages in respect of a continuing cause of action to be assessed up to the time of the assessment (RSC Ord 37 r 6) does not cover prospective loss after judgment: see *Minter v Geraghty* (1981) 38 ALR 68 at 85-86 per Macrossan J. Unlike common law damages, equitable damages in substitution for specific performance may be awarded if the contract is terminated after the action is commenced: *Bosaid v Andry* [1963] VR 465 at 484 per Sholl J.

13 *Johnson v Agnew* [1980] AC 367 at 400, [1979] 1 All ER 883 at 895-897, HL, per Lord Wilberforce.

14 *Shaw v Dalbridge Finance Co Ltd* (1970) 213 EG 885; *Johnson v Agnew* [1980] AC 367 at 400, [1979] 1 All ER 883 at 895, HL, per Lord Wilberforce.

15 *Doherty v Allmann* (1878) 3 App Cas 709.

16 *Landau v Curton* (1962) 184 EG 13, [1962] EGD 369.

17 Jones "Public' and 'Private' Law - definition without distinction' 45 MLR [1982] 240.

18 See the Chancery Amendment Act 1858 s 2 (repealed). The court's power to award damages was qualified by the words 'if it shall think fit'. See *Durell v Pritchard* (1865) 1 Ch App 244 at 252, CA, per Turner LJ; *Aynsley v Glover* [1874] LR 18 Eq 544 at 555, obiter per Jessel MR; *Elsley v JG Collins Insurance Agencies Ltd* [1978] 2 SCR 916 at 935, 83 DLR (3d) 1 at 15, Can SC, per Dickson J; Jones "Public' and 'Private' Law - definition without distinction' 45 MLR [1982] 240. But the measure of damages recoverable at common law and under the Act is the same in respect of the same cause of action: *Jaggard v Sawyer* [1995] 2 All ER 189 at 211, [1995] 1 WLR 269 at 290-291, CA, per Millett LJ.

19 *le* the Supreme Court Act s 50 which provides that a court 'may' award damages.

20 *Johnson v Agnew* [1980] AC 367 at 400, [1979] 1 All ER 883 at 895-896, HL, per Lord Wilberforce; *Jaggard v Sawyer* [1995] 2 All ER 189 at 211, [1995] 1 WLR 269 at 290, CA, per Millett LJ.

21 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 311, CA; *Black v Scottish Temperance Life Assurance Co* [1908] 1 IR 541 at 574 per Holmes LJ (revsd [1908] 1 IR 577, HL).

22 Such as delay, mistake, acquiescence and unconscionable conduct: see *Elsley v JG Collins Insurance Agencies Ltd* [1978] 2 SCR 916 at 935, 83 DLR 1 at 13 per Dickson J. As to these defences see EQUITY vol 16(2) (Reissue) PARA 901 et seq.

23     *Wedmore v Mayor of Bristol* (1862) 11 WR 136 at 137 per Stuart VC; *Ferguson v Wilson* (1866) LR 2 Ch App 77 at 91 per Cairns LJ; *JC Williamson Ltd v Lukey* (1931) 45 CLR 282 at 295 per Dixon J; *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 679, [1982] 42 ALR 69 at 73, (Aus) PC.

## **UPDATE**

### **1122 The existing jurisdiction to award equitable damages**

TEXT AND NOTES 7, 19, 20--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 12--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/9. DAMAGES IN EQUITY/1123. The jurisdiction to award damages in addition to or in substitution for an injunction.

### **1123. The jurisdiction to award damages in addition to or in substitution for an injunction.**

If damages are given in addition to an injunction, they are to compensate for the injury which has been done, and the injunction will prevent its repetition or continuance<sup>1</sup>. The court has jurisdiction to grant damages not only where the act complained of has been done and there is an intention to continue<sup>2</sup>, but also in a *quia timet* action<sup>3</sup>.

As a working rule, which has been applied in a number of cases, damages in substitution for an injunction may be given if the injury to the plaintiff's legal rights (1) is small, (2) is capable of being estimated in money, (3) can be adequately compensated by a small money payment and (4) it would be oppressive to the defendant to grant an injunction<sup>4</sup>. Although the rule has stood the test of time<sup>5</sup>, it is neither a rigid rule nor exhaustive<sup>6</sup> and the court must exercise its discretion even in a case where the four conditions are made out<sup>7</sup>. In the case of a continuing actionable nuisance, an award of damages in lieu of an injunction is only made in exceptional circumstances<sup>8</sup>.

The power to award damages in lieu of an injunction is discretionary<sup>9</sup>. Damages will not be awarded in lieu of an injunction where the effect would be to authorise the commission of future wrongs<sup>10</sup> or breaches of the rights of citizens<sup>11</sup>. Nor will damages be awarded in lieu of an injunction where the effect would be to expropriate the plaintiff's property<sup>12</sup>, or to compel a person to sell a property against his will at a valuation<sup>13</sup>. The defendant's conduct is a relevant factor in deciding whether to grant an injunction or damages<sup>14</sup> and it may be inappropriate to award damages in lieu of an injunction where a defendant has acted oppressively or has shown an unreasonable disregard for the rights of the plaintiff<sup>15</sup>. Damages will also be awarded in lieu of a mandatory injunction when the plaintiff suffers no substantial injury<sup>16</sup> or where the grant of an injunction would cause extreme hardship<sup>17</sup>. They may also be awarded where discretionary defences to the grant of specific relief are established<sup>18</sup> or where there is a real question whether a defendant has acted within his rights or has acted fairly<sup>19</sup>.

Acquiescence may be an entire bar to all equitable relief or a ground inducing the court to award equitable damages<sup>20</sup>. Thus the plaintiff's failure to seek interim relief may well induce the court to refuse an injunction and award damages<sup>21</sup>.

The court may exercise its discretion to award damages either in addition to or in substitution for an injunction, whether or not damages have also been specifically claimed<sup>22</sup>.

1 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851 at 857, HL, per Viscount Finlay.

2 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 319, CA; *Cowper v Laidler* [1903] 2 Ch 337; *Kine v Jolly* [1905] 1 Ch 480, CA (affd sub nom *Jolly v Kine* [1907] AC 1, HL).

3 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL, where opinions to the contrary in *Dreyfus v Peruvian Guano Co* (1889) 43 ChD 316, CA, were disapproved; *Hooper v Rogers* [1975] Ch 43, [1974] 3 All ER 417, CA, where damages were awarded in lieu of mandatory injunction. The damages will in such a case be solely in respect of the damage to be sustained in the future by the injuries which the injunction, if granted, would have prevented: *Leeds Industrial Co-operative Society Ltd v Slack* supra at 857 per Viscount Finlay. For the principle on which a *quia timet* action lies see EQUITY vol 16(2) (Reissue) PARA 484.

4 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch at 322-323, CA, per Smith LJ; *Fishenden v Higgs and Hill Ltd* (1935) 153 LT 128, CA; *Kennaway v Thompson* [1981] QB 966, [1980] 3 All ER 329, CA; *Redland Bricks Ltd v Morris* [1970] AC 652, [1969] 2 All ER 576, HL, where the award of both damages and an injunction was considered. As to damages in lieu of an injunction see EQUITY vol 16(2) (Reissue) PARA 628.

5 *Jaggard v Sawyer* [1995] 2 All ER 189 at 198, [1995] 1 WLR 269 at 278, CA, per Bingham MR, and at 208 and 287 per Millett LJ.

6 *Jaggard v Sawyer* [1995] 2 All ER 189 at 208, [1995] 1 WLR 269 at 287, CA, per Millett LJ. The rule is not even a sound rule in all cases of injury to light: see *Fishenden v Higgs and Hill Ltd* (1935) 153 LT 128 at 144, CA, per Maughan LJ; cf *Colls v Home & Colonial Stores Ltd* [1904] AC 179 at 213 per Lord Lindley; *Slack v Leeds Industrial Co-operative Society Ltd* [1924] 2 Ch 475 at 494, CA, per Sargant LJ. As to rights to light see EASEMENTS AND PROFITS A PRENDRE.

7 *Fishenden v Higgs and Hill Ltd* (1935) LT 128 at 141, CA, per Romer LJ; *Jaggard v Sawyer* [1995] 2 All ER 189 at 208, [1995] 1 WLR 269 at 287-288, CA, per Millett LJ; cf *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 316-317 per Lindley LJ. The latter case seems the high water mark of the use of the rule in a definitive way: see *Fishenden v Higgs and Hill Ltd* supra at 138 per Hanworth MR. See also *Miller v Jackson* [1977] QB 966, [1977] 3 All ER 338, CA (where an injunction restraining the use of a village ground for cricket was discharged and damages were awarded for the past and future inconvenience of a householder); *Kennaway v Thompson* [1981] QB 88 at 93, [1980] 3 All ER 329, CA, per Lawton LJ (where damages were not awarded in substitution for an injunction to restrain noisy motor boat racing).

However, the working rule cannot be limited by refusing to apply it to a trespass into the plaintiff's air space by the jib of a crane on the ground that it was a case of a nominal damages only and therefore actionable at law. Dicta to the contrary in *Woollerton & Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483, [1970] 1 WLR 411 were disapproved in *Jaggard v Sawyer* [1995] 2 All ER 189 at 199, [1995] 1 WLR 269 at 278-279, CA, per Bingham MR, and at 205 and 284-285 per Millett LJ.

8 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 316, CA, per Lindley LJ; see also *Pennington v Brinsop Hall Coal Co* (1877) 5 ChD 769; *Morrow v Stepney Corpn* (1920) 18 LGR 458. In cases of obstruction to light, if there is a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, the court ought to incline to damages rather than injunction: see *Colls v Home & Colonial Stores Ltd* [1904] AC 179 at 193, HL, per Lord Macnaghten.

9 *Durell v Pritchard* (1865) 1 Ch App 244; *Smith v Smith* (1875) LR 20 Eq 500; *Holland v Worley* (1884) 26 ChD 578; *Greenwood v Hornsey* (1886) 3 ChD 471.

10 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851 at 860, HL, per Viscount Finlay; *Smith v Smith* (1875) 20 Eq 500 at 505 per Jessel MR; *Holland v Worley* [1884] 26 ChD 578; *Krehl v Burrell* (1879) 11 ChD 146 at 148, CA, per James LJ; *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 315-316, CA, per Lindley LJ; *Cowper v Laidler* [1903] 2 Ch 337 at 341 per Buckley J; *Sefton v Tophams Ltd* [1965] Ch 1140; *Kennaway v Thompson* [1981] QB 88, [1980] 3 All ER 329, CA; cf *Sampson v Hodson-Pressinger* [1981] 3 All ER 710 at 715, 125 Sol J 623 at 623, CA, per Eveleigh LJ (where the argument was given little weight when advanced by the defendant). See also *Woollerton & Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483, [1970] 1 WLR 411 where, on the particular facts, an injunction was granted but postponed.

11 *Elliott v Islington London Borough Council* [1991] 10 EG 145, [1991] 1 EGLR 167, CA.

12 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 315, CA, per Lindley LJ; *Biogen Inc v Medeva plc* [1993] 110 RPC 475 at 486-487 per Aldous J.

13 *Dent v Auction Mart Co* (1866) LR 2 Eq 238 at 246 per Page Wood VC; *Aynsley v Glover* (1874) LR 18 Eq 544 at 552 per Jessel MR; *Krehl v Burrell* (1878) 7 ChD 551 (affd (1879) 11 ChD 146, CA); *Holland v Worley* (1884) 26 ChD 578; *Greenwood v Hornsey* (1886) 33 ChD 471 at 477 per Bacon VC; *Cowper v Laidler* [1903] 2 Ch 377 at 341; *Martin v Price* [1894] 1 Ch 276, CA; *Wood v Conway Corpn* [1914] 2 Ch 47, CA; *Slack v Leeds Industrial Co-operative Society Ltd* [1924] 2 Ch 475, CA; and see *Gilling v Gray* (1910) 27 TLR 39; *Woodhouse v Newry Navigation* [1898] 1 Ir 161, CA.

14 *Price v Hilditch* [1930] 1 Ch 500; *Pugh v Howells* (1984) 48 P & CR 298, CA. The question whether the defendant knew he was wrong is important: *Smith v Smith* (1875) LR 20 Eq 500.

15 *Colls v Home & Colonial Stores Ltd* [1904] AC 179 at 193, obiter per Lord Macnaghten.

16 *Bowes v Law* (1870) LR 9 Eq 636 at 642 per James VC; *Holland v Worley* (1884) 26 ChD 578 at 587 per Pearson J; *Sharp v Harrison* [1922] 1 Ch 502 at 516 per Astbury J. But damages will not be awarded where an injunction did not benefit the plaintiff: *Sefton v Tophams Ltd* [1965] Ch 1140.

17 *Pettey v Parsons* [1914] 1 Ch 704 at 723. The court is more inclined to award damages where the plaintiff offers to decline to apply for an injunction on unreasonable terms: *Isenberg v East India House Estate Co Ltd* (1863) 3 De GJ & Sm 263 at 273; *Senior v Pawson* (1866) LR 3 Eq 330; *Aynsley v Glover* [1874] LR 18 Eq 544 at 555; *Krehl v Burrell* (1878) 7 ChD 551 at 554 (affd (1879) 11 ChD 146, CA); *Holland v Worley* (1884) 26 ChD 578 at 585; *Colls v Home & Colonial Stores Ltd* [1904] AC 179 at 193.

18 Where the defence of hardship is made out (*Sharp v Harrison* [1922] 1 Ch 502; *Shaw v Applegate* [1977] 1 WLR 970, CA; *Bloomberg v Tricont Projects Ltd* (1980) 13 RPR 284 at 300); or where laches and acquiescence are made out (*Sayers v Collyer* (1884) 28 ChD 103; *Bracewell v Appleby* [1975] Ch 408, [1975] 1 All ER 993).

19 *Colls v Home & Colonial Stores Ltd* [1904] AC 179, HL; *Kine v Jolly* [1905] 1 Ch 480, CA (affd sub nom *Jolly v Kine* [1907] AC 1, HL). Where there is actual damage, however, damages may not be an adequate remedy: *Redland Bricks Ltd v Morris* [1970] AC 652, at 665-666, [1969] 2 All ER 576 at 579-580, HL, per Lord Upjohn.

20 *Sayers v Collyer* (1884) 24 ChD 103, CA; *HP Bulmer Ltd v J Bollinger SA and Champagne Lanson Père et Fils* [1977] 2 CMLR 625, [1978] FSR 79, CA; *Shaw v Applegate* [1978] 1 All ER 123, [1977] 1 WLR 970, CA.

21 *Landau v Curton* [1962] EGD 369, 184 EG 13; *Wrotham Park Estates Co Ltd v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798; *Shaw v Applegate* [1978] 1 All ER 123, [1977] 1 WLR 970, CA; cf *Black v Scottish Temperance Life Assurance Co* [1908] 1 IR 541; *Oxy Electric Ltd v Zainuddin* [1990] 2 All ER 902, [1991] 1 WLR 115.

22 *Catton v Wyld* (1863) 32 Beav 266; *Betts v Neilson* (1868) 3 Ch App 429 (affd sub nom *Neilson v Betts* (1870) LR 5 HL 1); *Lady Stanley of Alderley v Earl of Shrewsbury* (1875) LR 19 Eq 616; *Crawford v Hornsea Steam Brick & Tile Co Ltd* (1876) 45 LJ Ch 432, CA.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/9. DAMAGES IN EQUITY/1124. Assessment of damages: general principles.

### **1124. Assessment of damages: general principles.**

In general, the assessment of damages under the statutory jurisdiction and at common law will be governed by the same rules<sup>1</sup>. Equitable damages, like common law damages, are ordinarily compensatory<sup>2</sup>, but the coincidence of the measure of damages under statute and at common law is confined to cases in which damages are recoverable for the same cause of action<sup>3</sup>. So, where equitable damages are awarded in addition to, or in substitution for, an injunction or decree for specific performance and the contract breaker is liable in damages for loss compensatable at common law, the measure of compensation in equity for that loss is the common law measure<sup>4</sup>. This coincidence of common law and equitable damages does not inhibit the recovery of damages in equity where no cause of action exists at common law or where the loss for which equitable damages are sought is not compensatable at common law<sup>5</sup>. In either event, equitable damages may be awarded and they will be awarded independently of the common law measure<sup>6</sup>.

Accordingly, substantial damages in equity may be awarded where no such damages would be awarded at common law<sup>7</sup>. The ordinary rule at common law is that damages are assessed at the date of the wrongdoing which, in the case of contract, is the date of breach of contract<sup>8</sup>. This is a starting point and not an immutable rule<sup>9</sup>. The cases in which equitable damages are assessed as at the date of judgment are exceptions to the ordinary rule to be justified by reference to their particular circumstances<sup>10</sup>.

1 *Johnson v Agnew* [1980] AC 367 at 400, [1979] 1 All ER 883 at 895-896, HL, per Lord Wilberforce (where neither party argued for a different measure); *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932 at 954, [1994] 1 WLR 1016 at 1037, CA, per Hoffmann LJ. In *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897, it was held that equitable damages could be assessed at the date of judgment in order to reflect the appreciation in the value of the property which was the subject of the contract. The decision was explained in *Johnson v Agnew* supra where it was pointed out that common law damages can also be assessed on that basis.

2 *Jaggard v Sawyer* [1995] 2 All ER 189 at 202-204, [1995] 1 WLR 269 at 281-283, CA, per Bingham MR. There are exceptions to the general rule that damages are compensatory, as to which see PARAS 997-1000 ante where there is discussion of the recognition of the restitutionary element in damages: *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833, [1998] 2 WLR 805, CA, and of the recognition of the expectation interest in damages: *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL.

3 *Jaggard v Sawyer* [1995] 2 All ER 189 at 211, [1995] 1 WLR 269 at 290-291, CA, per Millett LJ.

4 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL; *Jaggard v Sawyer* [1995] 2 All ER 189 at 211, [1995] 1 WLR 269 at 291, CA, per Millett LJ.

5 *Jaggard v Sawyer* [1995] 2 All ER 189 at 210-211, [1995] 1 WLR 269 at 290-291, CA, per Millett LJ, explaining *Wrotham Park Estates Co Ltd v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798; *Surrey County Council v Bredero Homes* [1992] 3 All ER 302, 64 P & CR 57 (affd [1993] 3 All ER 705 at 711-712, [1993] 1 WLR 1361 at 1366-1367 per Dillon LJ, CA); and see *Crabb v Arun District Council (No 2)* (1976) 121 Sol Jo 86.

6 *Jaggard v Sawyer* [1995] 2 All ER 189 at 211, [1995] 1 WLR 269 at 291, CA, per Millett LJ.

7 *Jaggard v Sawyer* [1995] 2 All ER 189 at 209-212, [1995] 1 WLR 269 at 289-292, CA, per Millett LJ, explaining *Surrey County Council v Bredero Homes* [1992] 3 All ER 302, 64 P & CR 57 (affd [1993] 3 All ER 705 at 711-712, [1993] 1 WLR 1361 per Dillon LJ, CA), and approving and explaining *Wrotham Park Estates Co Ltd v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798.

8 See PARA 950 ante.

9 See PARA 951 ante.

10 *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897; *Horsler v Zorro* [1975] Ch 302, [1975] 1 All ER 584. The fact that equitable damages awarded to a buyer have been assessed as at the date of judgment from time to time has been used to support the view that there is a difference in the principles governing assessment of common law and equitable damages. The argument pays insufficient attention to the flexibility of the common law rules.

## **UPDATE**

### **1124 Assessment of damages: general principles**

NOTE 2--*A-G v Blake*, cited, reversed in part: [2000] 4 All ER 385, [2000] 3 WLR 625, HL.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/9. DAMAGES IN EQUITY/1125. Damages must cover same area as injunction.

**1125. Damages must cover same area as injunction.**

Where damages are awarded in substitution for an injunction, in order to be adequate they must cover the entire area which would be covered by the injunction<sup>1</sup>, and must therefore comprise damage accruing after, as well as before, the issue of the writ<sup>2</sup>, even though the wrongful act has come to an end before the trial<sup>3</sup>. In a purely quia timet action the damages will be solely in respect of injuries to be sustained at some future time<sup>4</sup>.

Where an injunction is granted and the plaintiff also claims general damages merely as ancillary to the real remedy of injunction, he is not entitled to substantial damages, but will be entitled to recover something as an acknowledgement of the wrong he has suffered<sup>5</sup>.

In an action for an injunction and compensation in damages, if the substantial relief claimed is obtained before the action comes on for hearing, the plaintiff will not be deprived of the right to damages in respect of the injury by the defendant's delay in rectifying the injury<sup>6</sup>.

1 *Fritz v Hobson* (1880) 14 ChD 542 at 557 per Fry J; *Molt v Wheatcroft* (1860) 30 LJ Ch 598.

2 *Fritz v Hobson* (1880) 14 ChD 542; *Chapman, Morsons & Co v Auckland Union Guardians* (1889) 23 QBD 294, CA; *Warwick and Birmingham Canal Navigation Co v Burman* (1890) 63 LT 670.

3 *Davenport v Rylands* (1865) LR 1 Eq 302; *Fritz v Hobson* (1880) 14 ChD 542.

4 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, HL; and see PARA 1123 text and note 3 ante.

5 *Lipman v George Pulman & Sons Ltd* [1904] 91 LT 132; *Sharp v Harrison* [1922] 1 Ch 502.

6 *Cory v Thames Ironworks and Shipbuilding Co Ltd* (1863) 11 WR 589 (specific performance).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/9. DAMAGES IN EQUITY/1126. Award and assessment of damages in injunction cases.

### **1126. Award and assessment of damages in injunction cases.**

Whilst the court may not regard an injury as compensated for by a benefit which results from it, the fact that a benefit does result to the plaintiff from the act complained of is an element to be considered in deciding whether an injunction should be granted or whether damages should be awarded<sup>1</sup>. Where an injunction is asked for on the ground that damages do not afford an adequate remedy, damages in respect of past injury may be given in addition to the injunction<sup>2</sup>, but an inquiry as to damages will not be ordered if the plaintiff has opened a case of substantial injury, entitling him to an injunction and damages, and has failed to prove any substantial damage<sup>3</sup>.

No money awarded in substitution for an injunction can be justly awarded unless it is at any rate designed to be a preferable equivalent to an injunction and therefore an adequate substitute for it<sup>4</sup>. In conformity with the general principles governing the assessment of damages<sup>5</sup>, where a plaintiff was entitled to damages for breach of confidence in respect of confidential information used by the defendant, the court directed that the damages should be assessed on the market value of the information as between a willing buyer and a willing seller<sup>6</sup>.

In a case of breach of restrictive covenant, the court ordered that the damages should be such a sum as might reasonably have been demanded as a quid pro quo for relaxing the covenant<sup>7</sup>. The same measure of damages was applied in a case in which the defendant constructed a driveway in breach of a restrictive covenant and engaged in a continuing trespass on the plaintiff's section of a roadway<sup>8</sup>. That measure of damages may be appropriate in cases in which the court declines to grant an injunction to prevent the commission of a future wrong<sup>9</sup>. In accordance with the same principle, where a defendant extended a right of way unlawfully, he was held liable to pay an amount of damages which, so far as could be estimated, was equivalent to a proper and fair price which would be payable for the acquisition of the right of way in question<sup>10</sup>.

1 *National Provincial Plate Glass Insurance Co v Prudential Assurance Co* (1877) 6 ChD 757 at 769 per Fry J.

2 *Pennington v Brinshop Hall Coal Co* (1877) 5 ChD 769; cf *Martin v Price* [1894] 1 Ch 276, CA, where damages were given in respect of injury actually caused, and an injunction granted to prevent further injury.

3 *Kino v Rudkin* (1877) 6 ChD 160.

4 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851 at 870, HL, per Lord Sumner.

5 As to the measure of damages generally see PARA 804 ante.

6 *Seager Copydex Ltd (No 2)* [1969] 2 All ER 718, [1969] 1 WLR 809, CA.

7 *Wrotham Park Estates Co v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798, where the damages awarded were 5% of the developer's anticipated profit. Though the measure of damages applied in that case was doubted in *Surrey County Council v Bredero Homes* [1992] 3 All ER 302, 64 P & CR 57 (affd [1993] 3 All ER 705 at 709-712, [1993] 1 WLR 1361 at 1364-1367, CA, per Dillon LJ, and at 715 and 1370 per Steyn LJ); it was explained and applied in *Jaggard v Sawyer* [1995] 2 All ER 189 at 201-202, [1995] 1 WLR 269 at 280-282, CA, per Bingham MR and at 209-212 and 288-292 per Millett LJ. See also *Tito v Waddell (No 2)* [1977] Ch 106 at 335, [1977] 3 All ER 129 at 319 per Megarry VC.

8 *Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA.

9 *Jaggard v Sawyer* [1995] 2 All ER 189 at 202, [1995] 1 WLR 269 at 281-282, CA, per Bingham MR.

10 *Bracewell v Appleby* [1975] Ch 408, [1975] 1 All ER 993. Despite criticism of that decision in *Anchor Brewhouse Developments Ltd v Berkley House (Docklands) Developments* (1987) 38 BLR 82 at 105 per Scott J, the decision was discussed and seemingly approved in *Jaggard v Sawyer* [1995] 2 All ER 189 at 200, [1995] 1 WLR 269 at 279-280, CA, per Bingham MR.

## UPDATE

### 1126 Award and assessment of damages in injunction cases

NOTE 7--See eg *Gafford v Graham* [1999] 41 EG 159, CA. See also *Hammersmith LBC v Creska (No 2)* [2000] L & TR 288 (relief by way of injunction was disproportionate as tenant's breach of covenant only caused small injury to landlord's legal right; landlord would be awarded damages in lieu); *Mortimer v Bailey* [2004] EWCA Civ 1514, [2005] 2 P & CR 175 (damages not adequate and mandatory injunction upheld); and *WWF-World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 All ER 74.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/9. DAMAGES IN EQUITY/1127. The jurisdiction to award damages in addition to or in substitution for specific performance.

**1127. The jurisdiction to award damages in addition to or in substitution for specific performance.**

The award of equitable damages is to be distinguished from the payment of compensation by the seller or the buyer in association with specific performance of a contract<sup>1</sup>. Where a court has jurisdiction<sup>2</sup> to entertain an application for an injunction or specific performance, it may award damages in equity in addition to or in substitution for an injunction or specific performance<sup>3</sup>.

If specific performance is impossible or refused, the plaintiff may be entitled to damages at law for breach of contract<sup>4</sup>. Equitable damages may be awarded in some cases where damages at law cannot be recovered<sup>5</sup>, and where specific performance is refused on discretionary grounds<sup>6</sup>. However, equitable damages cannot be awarded if the court has no jurisdiction to order specific performance<sup>7</sup> at the time of the writ<sup>8</sup> and the award of damages is subject to equitable considerations such as delay, mistake, acquiescence and unconscionable conduct<sup>9</sup>.

Equitable damages may be awarded in those cases in which specific performance can be granted, for example contracts for the sale of goods<sup>10</sup>, the sale of shares<sup>11</sup>, for the loan of money<sup>12</sup>, personal services<sup>13</sup>, contracts terminable on short notice<sup>14</sup> and possibly expired leases<sup>15</sup>.

Damages cannot be awarded where there is no concluded agreement<sup>16</sup>. They will be refused where specific performance has become impossible before the writ is issued<sup>17</sup>, or where the plaintiff disables himself from performance by disposing of the subject matter of the contract<sup>18</sup>, or where the right to specific performance has been extinguished by laches<sup>19</sup>. Equitable damages can, however, be awarded where specific performance has become impossible because the subject matter of the contract has been disposed of between the commencement of the action and the hearing<sup>20</sup> or where during that time the contract has been performed<sup>21</sup>.

The power to award equitable damages is a discretionary remedy<sup>22</sup>; thus acquiescence may induce the court to refuse both specific performance and damages, while a lesser degree of acquiescence may result in refusal of specific performance and an award of equitable damages<sup>23</sup>.

An award of damages for breach of a part of a contract may be coupled with an order for specific performance of the rest of the contract<sup>24</sup>.

Where the statement of claim does not contain a claim for equitable damages, the court may give leave for the statement of claim to be amended to include such a claim<sup>25</sup>, though damages in lieu of specific performance have been awarded in the absence of such a claim<sup>26</sup>. If there is no claim for specific performance in the pleadings, there is an obvious difficulty in awarding damages as a substitute for what is not claimed<sup>27</sup>, but it seems that a claim for specific performance is not vital if it is clear that damages are being claimed<sup>28</sup> in substitution for an equitable remedy<sup>29</sup>.

1 As to specific performance and compensation see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 948 et seq.

2 'Jurisdiction' includes powers: see the Supreme Court Act 1981 s 151(1).

3 See ibid s 50 (Court of Appeal and High Court). This power is extended to county courts by the County Courts Act 1984 ss 23, 38 (s 38 substituted by the Courts and Legal Services Act 1990 s 3). As to the history of the power see PARAS 1120-1121 ante.

4 Apart from an action in contract it is possible that an action in tort may be brought, for example, in deceit or under the Misrepresentation Act 1967: see PARAS 1109-1110 ante; and generally MISREPRESENTATION AND FRAUD.

5 For example, where the action was begun before the contractual date for completion: *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197, [1981] 3 All ER 667.

6 *McKenna v Richey* [1950] VLR 360 at 375, [1950] ALR 778 at 791.

7 It has been stated that for this purpose the court has no jurisdiction to entertain an action for specific performance if the contract is of a class of contracts concerning which the court would not in any circumstances decree specific performance; for example, contracts for the sale and purchase of commodities readily available in the market at an ascertainable price and contracts for personal services: *Price v Strange* [1978] Ch 337 at 369, [1977] 3 All ER 371 at 393 per Buckley LJ; cf *Price v Strange* supra at 359 and 385 per Goff LJ.

8 *Jaggard v Sawyer* [1995] 2 All ER 189 at 205, [1995] 1 WLR 269 at 284-285, CA, per Millett LJ (an injunction case).

9 As to delay, mistake, acquiescence and unconscionable conduct see EQUITY vol 16(2) (Reissue) PARAS 429, 431, 439 et seq, 909 et seq.

10 As in the case of a contract for the sale of a rare chattel of special value which is capable of specific performance.

11 Where the shares are not available on the market.

12 The ordinary rule is that the court will not order specific performance of a contract of loan: *Rogers v Challis* (1859) 27 Beav 175; but it is not an absolute rule. For the exceptions see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 959.

13 Despite the traditional reluctance to enforce such contracts, they are occasionally specifically enforced: *Wilson v Furness Rly Co* (1869) LR 9 Eq 28 at 33 per James VC; *Tito v Waddell (No 2)* [1977] Ch 106 at 335, [1977] 3 All ER 129 at 319 per Megarry VC; *Posner v Scott-Lewis* [1987] Ch 25, [1986] 3 All ER 513; *Powell v Brent London Borough Council* [1988] 1 ICR 176.

14 *Rosser v Maritime Services Board of New South Wales (No 2)* (30 August 1993, unreported), NSW SC.

15 *McMahon v Ambrose* [1987] VR 817, held that there was no jurisdiction to award equitable damages where the lease had expired before action brought. However, in *McMahon v Ambrose* supra at 832 per McGarvie J, dissenting, it was pointed out that interests other than in the future enjoyment of the term may justify specific performance. It may be a question of whether a decree of specific performance would be futile. See also Meagher, Gummow and Lehane *Equity - Doctrines and Remedies* (3rd Edn, 1992) PARA 2029.

16 *Lewers v Earl of Shaftesbury* (1866) LR 2 Eq 270 (affd (1867) 16 LT 135); *Stinson v Gray* [1929] 1 Ch 629.

17 *Mama v Sassoon* (1928) 55 IA 360 at 374, PC; *Jaggard v Sawyer* [1995] 2 All ER 189 at 205, [1995] 1 WLR 269 at 284-285, CA, per Millett LJ.

18 *Ferguson v Wilson* (1866) 2 Ch App 77; *Hipgrave v Case* (1885) 28 ChD 356, CA; *Lavery v Pursell* (1888) 39 ChD 508 at 519 per Chitty J.

19 *Lavery v Pursell* (1888) 39 ChD 508; but see *McKenna v Richey* [1950] VLR 360, [1950] ALR 773.

20 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL. See also *Davenport v Rylands* (1865) LR 1 Eq 302 at 307 per Wood VC; *Ferguson v Wilson* (1866) 2 Ch App 77 at 91 per Cairns LJ.

21 *Cory v Thames Ironworks & Shipbuilding Co Ltd* (1863) 8 LT 237.

22 See PARA 1122 ante.

23 *Sayers v Collyer* (1884) 28 ChD 103 at 110, CA, per Fry J.

24 *Soames v Edge* (1860) Johns 669 (where specific performance was decreed for so much of the contract as provided for the grant of a lease and damages were awarded for so much of the contract as provided for the building of a house). In Sugden *A Practical Treatise on the New Statutes Relating to Property* (2nd Edn, 1862) p 327, Lord St Leonards doubted the correctness of the decision on the ground that equity does not execute a part of a contract only. *Soames v Edge* supra has been followed: see *Middleton v Greenwood* (1864) 2 De GJ & Sm 142; *London Corp'n v Southgate* (1868) 38 LJ Ch 141. Difficulties may arise, however, where specific

performance cannot be awarded for part of a contract eg when it contains an agreement for personal services:  
*Ogden v Fossick* (1862) 4 De GF & J 426.

25 *Surrey County Council v Bredero Homes* [1992] 3 All ER 302, (1991) 64 P & CR 57; affd [1993] 3 All ER 705, [1993] 1 WLR 1361, CA.

26 *Wedmore v Bristol Corpn* (1862) 7 LT 459; *Catton v Wyld* (1863) 32 Beav 266; *Betts v Neilson* (1868) 3 Ch App 429 (affd sub nom *Neilson v Betts* (1870) LR 5 HL 1); *Lady Stanley of Alderley v Earl of Shrewsbury* (1875) LR 19 Eq 616.

27 See *Horsler v Zorro* [1975] Ch 302 at 307, [1975] 1 All ER 584 at 588 per Megarry J. In Australia and Canada, however, damages can be awarded where there is no claim for specific performance but the circumstances are such that that remedy could have been claimed: *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245; *Masai Minerals Ltd v Heritage Resources Ltd* (1979) 95 DLR (3d) 488 (affd (1981) 119 DLR (3d) 393).

28 Ie by virtue of the Supreme Court Act 1981 s 50; see the text and notes 2-3 supra.

29 *Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA (an injunction case to which the same principles apply).

## UPDATE

### **1127 The jurisdiction to award damages in addition to or in substitution for specific performance**

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/9. DAMAGES IN EQUITY/1128. Award and assessment of damages in specific performance cases.

### **1128. Award and assessment of damages in specific performance cases.**

The award and assessment of damages in specific performance cases, and in particular their compensatory nature, has been mentioned earlier in this title<sup>1</sup>.

Compensation is normally achieved by placing the innocent party, so far as money can do so, in the same position as if the contract had been performed<sup>2</sup>. Only in exceptional circumstances do courts depart from this policy and award some greater or lesser sum<sup>3</sup>. Ordinarily there is one measure of damages in contract, which is the loss truly suffered by the promisee<sup>4</sup>. Prima facie, the measure of damages will be 'loss of bargain', that is the extent to which the market value of the property in question exceeds the contract price (if the claimant is the buyer) or falls short of it (if the claimant is the seller)<sup>5</sup>. It is irrelevant that the buyer wishes to acquire the property for personal occupation and not for resale<sup>6</sup>.

If it is more beneficial to him, the innocent party can claim instead to be put in the same position as if the contract had never been made, by being reimbursed for expenditure (including pre-contract expenditure) which it was within the contemplation of the parties that he would incur and which has been wasted as a result of the breach<sup>7</sup>. If he has incorrectly represented that he has power to sell the property, he may be liable for damages for misrepresentation even if damages for loss of bargain cannot be claimed for breach of contract<sup>8</sup>.

Where damages are awarded in lieu of specific performance, the principle that damages should be assessed as at the date of the breach of contract (which is the usual rule in relation to commercial contracts) does not normally apply<sup>9</sup>. Time spent in seeking an equitable remedy may delay the point at which it becomes plain that the contract is lost and that damages must be sought<sup>10</sup>. Under a contract for the sale of land, the appropriate date may be (according to circumstance) the date on which specific performance could have been ordered<sup>11</sup>, or the date on which a decree for specific performance obtained by the seller ceased, without his fault, to be effectively enforceable and the contract became lost<sup>12</sup>. In other conditions the date of judgment may be the proper date<sup>13</sup>. Thus damages have been ordered to be assessed as at the date on which it ceased to be within the seller's power to convey the property<sup>14</sup>, as at the date on which the buyer elected to abandon his claim to specific performance<sup>15</sup>, and as at the date of judgment<sup>16</sup>. If the buyer has been guilty of delay in pursuing his claim, assessment may be directed as at an earlier date<sup>17</sup>.

In calculating the damages due to a seller, credit must be given for any deposit which has been forfeited<sup>18</sup>.

As a general rule, any claim to damages must be limited to the loss which is reasonably foreseeable as arising from the breach, either in the ordinary course of things or because of special circumstances known to the party committing the breach<sup>19</sup>. For this purpose, special circumstances are necessary to justify imputing to a seller of land knowledge that the buyer intends to use it in any particular manner<sup>20</sup>.

A plaintiff who claims specific performance and damages in the alternative<sup>21</sup> must elect at trial between the claims<sup>22</sup>.

Where damages are claimed in addition to specific performance, in certain circumstances a plaintiff may be entitled to damages for breach of contract as well as to an order for specific performance. An agreement may be specifically enforced in part, leaving the plaintiff to his claim in damages for breach of the rest of the agreement<sup>23</sup>. Damages may be awarded for

delay in completion<sup>24</sup>. They have also been awarded where a buyer elected to complete a contract for the purchase of property which was charged to secure a sum greater than the purchase price<sup>25</sup>.

1 See PARA 1124 ante.

2 *Johnson v Agnew* [1980] AC 367 at 400, [1979] 1 All ER 883 at 895, HL, per Lord Wilberforce; *Suleman v Shahsavari* [1989] 2 All ER 460, [1988] 1 WLR 1181; *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA. As to the measure of damages for breach of contract see PARA 941 et seq ante. See also the following cases on damages in lieu of an injunction: *Wrotham Park Estates Co v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798; *Bracewell v Appleby* [1975] Ch 408, [1975] 1 All ER 993; *Tanner v Tanner* [1975] 3 All ER 776, [1975] 1 WLR 1346, CA; *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888, [1986] 1 WLR 922.

The method of assessment in *Wrotham Park Estates Co v Parkside Homes Ltd* supra was doubted in *Wrotham Park Settled Estates v Hertsmere Borough Council* [1993] RVR 56, [1993] 27 EG 124, CA; and see *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 3 All ER 394, [1988] 1 WLR 1406, CA; *Surrey County Council v Bredero Homes Ltd* [1992] 3 All ER 302, 64 P & CR 57 (affd [1993] 3 All ER 705, [1993] 1 WLR 1361, CA). *Wrotham Park Estates Co v Parkside Homes Ltd* supra was, however, approved and applied in *Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA.

3 For example, the gain which the breaker of a contract derives from the breach, rather than the innocent party's loss. See *A-G v Blake (Jonathan Cape)* [1998] 1 All ER 833, [1998] 2 WLR 805, CA.

4 *Ruxley Electronics and Construction v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL.

5 See SALE OF LAND. The rule in *Bain v Fothergill* (1874) LR 7 HL 158, which limited the damages recoverable where a contract was defeated by the seller's failure to show a good title, was abolished by the Law of Property (Miscellaneous Provisions) Act 1989 ss 3, 4(a), 5(3) in respect of contracts made on or after 27 September 1989.

6 *Ridley v De Geerts* [1945] 2 All ER 654, [1945] EGD 133, CA.

7 *Lloyd v Stanbury* [1971] 2 All ER 267, [1971] 1 WLR 535; *Anglia Television Ltd v Reed* [1972] 1 QB 60, [1971] 3 All ER 690, CA. See also *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, Aust HC, where the costs of searching for a non-existent subject matter of the contract were held to have been reasonably incurred. Where the seller fails to complete but the buyer cannot prove any damages by way of loss of bargain, he may (in addition to recovering his deposit) recover interest on the deposit and the costs of approving and executing the contract, investigating title, searching and preparing the conveyance: *Wallington v Townsend* [1939] Ch 588, [1939] 2 All ER 225.

8 See the Misrepresentation Act 1967 s 2(1); *Watts v Spence* [1976] Ch 165, [1975] 2 All ER 528; *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297, [1991] 3 All ER 294, CA; *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, [1992] 1 All ER 865; and generally MISREPRESENTATION AND FRAUD; SALE OF LAND.

9 See SALE OF LAND.

10 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL.

11 *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897; see also *Horsler v Zorro* [1975] Ch 302, [1975] 1 All ER 584.

12 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL (where there was a failure to complete by the buyer, and it was reasonable for the sellers to seek specific performance, the appropriate date for assessment of damages was when, without the seller's default, that remedy was aborted: ie when the mortgagees of the property contracted to sell part of the property pursuant to an earlier order for possession, and not the date when the decree for specific performance was obtained, drawn up or entered or the date when the buyer failed to complete). See also *Grant v Dawkins* [1973] 3 All ER 897, [1973] 1 WLR 1406 (where the property sold was subject to mortgages exceeding the purchase price, damages were assessed as at the date appointed by the court for the discharge of the mortgages); and see generally SALE OF LAND.

13 *Malhotra v Choudhury* [1980] Ch 52, [1979] 1 All ER 186, CA.

14 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL. See also *Techno Land Improvements Ltd v British Leyland (UK) Ltd* [1979] 2 EGLR 27, 252 EG 805; *Ricci v Masons (a firm)* [1993] 2 EGLR 159.

15 *Domb v Isoz* [1980] Ch 548, [1980] 1 All ER 942, CA.



16 *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897; *Malhotra v Choudhury* [1980] Ch 52, [1979] 1 All ER 186, CA. See also *Grant v Dawkins* [1973] 3 All ER 897, [1973] 1 WLR 1406.

17 *Malhotra v Choudhury* [1980] Ch 52, [1979] 1 All ER 186, CA.

18 *Shuttleworth v Clews* [1910] 1 Ch 176. As to the statutory power to order the return of the deposit see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARAS 946-947.

19 See *Hadley v Baxendale* (1854) 9 Exch 341. See also PARA 1015 et seq ante.

20 *Diamond v Campbell-Jones* [1961] Ch 22, [1960] 1 All ER; applying *Hadley v Baxendale* (1854) 9 Exch 341. Cf *Cottrill v Steyning and Littlehampton Building Society* [1966] 2 All ER 295, [1966] 1 WLR 753 where the seller knew of the buyer's intention to develop the property and damages were assessed on that footing.

21 As to pleading alternative claims see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 921.

22 As to election between remedies generally see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 961.

23 *Soames v Edge* (1860) Johns 669. See PARA 1127 note 24 ante.

24 *Raineri v Miles* [1981] AC 1050, [1980] 2 All ER 145, HL; *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197, [1981] 3 All ER 667 (damages awarded where land had been conveyed to plaintiffs after issue of writ so that claim for specific performance did not fall to be considered). See also *Jaques v Millar* (1877) 6 ChD 153; *Royal Bristol Permanent Building Society v Bomash* (1887) 35 ChD 390; *Jones v Gardiner* [1902] 1 Ch 191; *Phillips v Lamdin* [1949] 2 KB 33, [1949] 1 All ER 770; *Ford-Hunt v Raghbir Singh* [1973] 2 All ER 700, [1973] 1 WLR 738; *Easton v Brown* [1981] 3 All ER 278 (damages for delay in complying with specific performance order); *Seven Seas Properties Ltd v Al-Essa* [1989] 1 All ER 164, [1986] 1 WLR 1272 (combination of specific performance and Mareva injunction jurisdictions by order for retention of purchase price pending inquiry as to damages).

25 *Grant v Dawkins* [1973] 3 All ER 897, [1973] 1 WLR 1406 (where the damages were limited to the excess of the value of the property, as assessed at the date of discharge of the mortgages, over the purchase price).

## UPDATE

### 1128 Award and assessment of damages in specific performance cases

NOTE 3--*A-G v Blake*, cited, reversed in part: [2000] 4 All ER 385, [2000] 3 WLR 625, HL (defendant ordered to account for profits arising from his breach of contract).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/9. DAMAGES IN EQUITY/1129. The jurisdiction to award equitable compensation.

### **1129. The jurisdiction to award equitable compensation.**

Equitable compensation is to be distinguished from damages<sup>1</sup>, although both remedies are compensatory<sup>2</sup>. It is also to be distinguished from the equitable remedy of an account of profits<sup>3</sup>. Equity possesses an inherent jurisdiction to award equitable compensation<sup>4</sup>. In suits between seller and buyer, compensation is granted by way of an abatement of the purchase price as ancillary to or in order to effectuate specific performance<sup>5</sup>.

The foundation of the jurisdiction is that equity looks at the substance and not the letter of the contract<sup>6</sup> and will not allow a party to take unconscientious advantage of a circumstance that makes strict performance impossible<sup>7</sup>. It is exercised where strict performance of the contract is not possible and is awarded where there is a deficiency in the subject matter of the sale resulting in a diminution or deterioration in the property sold or its value<sup>8</sup>. It is exercised on the basis that there is a misdescription in the contract of sale and, if exercised in favour of a buyer, results in an abatement of the purchase price<sup>9</sup>. The abatement granted is in proportion to the deficiency of the property<sup>10</sup>.

The court will only grant relief to a seller by way of specific performance with compensation to the buyer if the buyer can obtain substantially what the contract provides for<sup>11</sup> or where the buyer is willing to accept compensation<sup>12</sup>. Compensation has been awarded to a seller where the buyer was bound to make compensation for additional land<sup>13</sup>. There may be exceptional circumstances which justify exercising the jurisdiction in favour of a seller, for example, where the buyer is aware of a mistake by the seller<sup>14</sup>.

The contract of sale may itself contain a clause governing the payment of compensation<sup>15</sup>. The exercise of inherent jurisdiction to grant compensation is not dependent on the existence of such a clause.

Equity also exercises an inherent jurisdiction to award compensation for breach of equitable duties, notably for breach of trust<sup>16</sup>, for breach of other fiduciary duties<sup>17</sup>, for breach of an equitable duty of confidence<sup>18</sup>, even perhaps for the exercise of undue influence<sup>19</sup>. The remedy of compensation for breach of equitable duty is just one of a number of exclusively equitable remedies available for such breach. Other equitable remedies are rescission and restitution, a proprietary remedy in the form of the constructive trust and a personal remedy in the form of an account of profits<sup>20</sup>.

The nature of the case will determine the appropriate remedy to be selected<sup>21</sup>. In many situations, breach of equitable duty will result in rescission of a disposition or transaction leading to a restitutionary remedy resulting in the restoration or replacement of property improperly acquired<sup>22</sup>. In cases in which restitution cannot be achieved or is inadequate, the award of equitable compensation may be appropriate.

Interest may be awarded in cases in which equitable compensation for breach of fiduciary duty is granted<sup>23</sup>.

1 *Jenkins v Parkinson* (1833) 2 My & K 5; Fry *Specific Performance of Contracts* (6th Edn, 1985) p 600. See also *King v Poggioli* (1923) 32 CLR 222 at 246-247 per Starke J (where a distinction was drawn between damages for delay in completing a contract and compensation for a deficiency in the subject matter of the contract).

2 An innocent buyer was entitled to compensation which would place him 'in the same position as he would be entitled to stand': *Barker v Cox* (1876) 4 ChD 464 at 469 per Bacon VC. See also Harpum 'Specific Performance with Compensation as a Buyer's Remedy - A Study in Contract and Equity' (1981) 40 CLJ 47 at 82

(where the suggestion is made that the two remedies are in substance the same). The distinction between the two is largely a matter of historical development.

3 An account of profits has been described 'as an equitable claim for money had and received': *Watson v Holliday* (1882) 20 ChD 780 at 784 per Kay J.

4 See *McKenna v Richey* [1950] VLR 360 at 376, [1950] ALR 778 at 792 per O' Bryan J.

5 *Newham v May* (1824) 13 Price 749 at 752. See further SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 951.

6 *Rutherford v Acton-Adams* [1915] AC 866 at 869, PC.

7 *Halsey v Grant* (1806) 13 Ves 73 at 77.

8 *Rutherford v Acton-Adams* [1915] AC 866 at 870, PC; *Clarke v Ramuz* [1891] 2 QB 456 at 461; *King v Poggioli* (1923) 32 CLR 222 at 246 per Starke J; and see SALE OF LAND; SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 948 et seq.

9 *Mortlock v Buller* (1804) 10 Ves 292 at 316 per Lord Eldon LC.

10 *Milligan v Cooke* (1808) 16 Ves 1; *Hill v Buckley* (1811) 17 Ves 394. The jurisdiction is mainly exercised where there is a deficiency in the area contracted to be sold. So, where the sellers contracted to sell the entirety of a freehold property of which they had title to a moiety only, an abatement of one-half of the purchase money was ordered: *Hooper v Smart* (1874) LR 18 Eq 683 at 684 per Hall VC. See also *Topfell Ltd v Gallery Properties Ltd* [1979] 2 All ER 388, [1979] 1 WLR 446 where it was held that there should be an abatement of the purchase price by reference to presumed market values.

11 *Rutherford v Acton-Adams* [1915] AC 866 at 869, PC; *Calcraft v Roebuck* (1790) 1 Ves 221 at 226; *McQueen v Farquhar* (1805) 11 Ves 467; *Watson v Burton* [1956] 3 All ER 929 at 938, [1957] 1 WLR 19 at 31 per Wynn-Parry J. Specific performance with compensation was refused where a wharf and a jetty were sold together but the jetty was liable to be removed by the Corporation of London: *Peers v Lambert* (1844) 7 Beav 546.

12 *Dyer v Hargrave* (1805) 10 Ves 505.

13 *Leslie v Tompson* (1851) 9 Hare 268.

14 See Jones and Goodhart *Specific Performance* (1986) p 237.

15 See SALE OF LAND; SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 948 et seq.

16 *Target Holdings Ltd v Redfern (a firm)* [1996] AC 421 at 434, [1995] 3 All ER 785 at 793, HL, per Lord Browne-Wilkinson; *Caffrey v Darby* (1801) 6 Ves 488; *Clough v Bond* (1838) 3 My & Cr 490; *Bartlett v Barclays Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139; *Bartlett v Barclays Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92; *Re Dawson* [1966] 2 NSW 211.

17 *Nocton v Lord Ashburton* [1914] AC 932 at 956-957, HL, per Viscount Haldane LC; *Clark Boyce v Mouat* [1994] 1 AC 428, [1993] 4 All ER 268; *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129; *Warman International Ltd v Dwyer* (1995) 182 CLR 544; *Day v Mead* [1987] 2 NZLR 443, NZCA.

18 *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Dept of Community Services and Health* (1990) 17 IPR 545 at 556, (1989) 89 ALR 366 at 370 per Gummow J. As to the equitable obligation of confidence see EQUITY vol 16(2) (Reissue) PARA 428.

19 *Mahoney v Purnell* [1996] 3 All ER 61 (where equitable compensation was awarded for undue influence against a party who was described as standing in a fiduciary position). See Heydon 'Equitable Compensation for Undue Influence' (1997) 113 LQR 8 where the conclusion that equitable compensation is available for undue influence is described as 'impeccable'. As to undue influence see EQUITY vol 16(2) (Reissue) PARA 417 et seq.

20 *Nocton v Lord Ashburton* [1914] AC 932 at 956-957, HL, per Viscount Haldane LC.

21 *Spence v Crawford* [1939] 3 All ER 271 at 288, HL; *Maguire v Makaronis* (1997) 188 CLR 449 at 467.

22 *Maguire v Makaronis* (1997) 188 CLR 449 at 467.

23 *Wallersteiner v Moir (No 2)* [1975] 1 QB 373, [1975] 1 All ER 849, CA. Interest was not awarded to the date of judgment in *Mahoney v Purnell* [1996] 3 All ER 61 notwithstanding the fact that compensation was assessed as at March 1988.

## **UPDATE**

### **1129 The jurisdiction to award equitable compensation**

TEXT AND NOTES--Where a co-owner of property who for some reason is not in occupation and, in the circumstances, cannot reasonably take up occupation, it will normally be fair or equitable to charge the occupying co-owner occupation rent (or equitable compensation): *Re Barcham* [2008] EWHC 1505 (Ch), [2008] 2 FCR 643 (trustee in bankruptcy's entitlement to occupation rent from bankrupt's spouse).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/9. DAMAGES IN EQUITY/1130. Award and assessment of equitable compensation.

### **1130. Award and assessment of equitable compensation.**

Compensation is awarded for that which the plaintiff has lost by reason of the defendant acting in breach of equitable duty<sup>1</sup>. The basic rule governing the obligation of a defaulting trustee for breach of trust is that the trustee restore or pay to the trust either the assets which have been lost to the estate by reason of the breach or compensation for such loss<sup>2</sup>. If specific restitution of trust property is not possible, the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed<sup>3</sup>. Even if the immediate cause of the loss is the act or omission of another, the trustee must make good the loss to the trust estate if such loss would not have occurred but for the breach<sup>4</sup>.

Thus the common law rules of remoteness of damage and causation do not apply<sup>5</sup>; nor does the doctrine of novus actus interveniens<sup>6</sup>. Nevertheless, some causal connection is required between the breach of trust and the loss for which compensation is sought because of the fact that the loss would not have occurred but for the breach<sup>7</sup>. The losses made good are only those which, on a common sense view of causation, were caused by the breach<sup>8</sup>.

The quantum of compensation payable is assessed as at the date of judgment, when it is fixed at the figure necessary to put the trust estate or the beneficiary in the position which would have obtained had there been no breach<sup>9</sup>. Where the trusts have come to an end, the compensation is payable not to the trust estate but directly to the beneficiary<sup>10</sup>.

In the case of a bare commercial trust, such as arises when moneys are paid by a client to a solicitor in connection with a conveyancing transaction, as distinct from a traditional trust, once the transaction has been completed, the liability of the defaulting trustee is limited to the loss sustained<sup>11</sup>.

In the case of a claim for compensation for breach of fiduciary duty not being a breach of trust by a trustee, there is some support for the proposition that the principles applicable to compensation for breach of trust apply also to compensation for such a breach of fiduciary duty<sup>12</sup>. There is also some support for the proposition that the common law rules as to causation<sup>13</sup> and foreseeability<sup>14</sup> do not apply to the assessment of equitable compensation. However, there is an argument that equity should adopt the common law rules of causation, remoteness in toto and mitigation, even contributory negligence<sup>15</sup>, particularly in cases where the person subject to an equitable duty is sought to be made liable for negligence<sup>16</sup>.

The question is currently unresolved<sup>17</sup>, but the law in England may be developing to the point that in awarding equitable compensation for breach of fiduciary duty, the common law principle of causation using hindsight and common sense will be applied<sup>18</sup>, subject to the possible qualification that the onus is on the defendant to show that a discharge of the fiduciary's duty would not have altered the status quo ante<sup>19</sup>. Compensation is limited to that which flows from the breach of the relevant equitable duty<sup>20</sup> so that the first step in ascertaining the amount of compensation payable is identifying the actual breach of equitable duty.

Equitable compensation, like other equitable remedies, should be fashioned to meet the needs of the particular case, and the compensation to be awarded will be assessed by reference to the nature of the equitable obligation which has been breached<sup>21</sup>. So, where agreements were entered into as a result of presumed influence by a person who occupied a fiduciary position and the parties could not be restored to their former position, equitable compensation was awarded on the basis of the value of what the plaintiff had surrendered under the agreements with credit given for what he had received under them<sup>22</sup>.

A plaintiff must elect between an order for an account of profits and an inquiry for equitable compensation<sup>23</sup>.

1 *Nocton v Lord Ashburton* [1914] AC 932 at 956-957, HL, per Viscount Haldane LC; *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421 at 438-439, [1995] 3 All ER 785 at 797-798, HL, per Lord Browne-Wilkinson; *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 at 160 per McLachlin J; and see Davidson 'The Equitable Remedy of Compensation' [1982] 3 Melb Univ L Rev 349 at 354. It has been said that, though equity approaches liability for making good a breach of trust from a different starting point, two fundamental common law principles are applicable as much in equity as at common law: *Target Holdings Ltd v Redferns (a firm)* supra at 432 and 792 per Lord Browne-Wilkinson. The two principles are (1) the defendant's wrongful act must cause the damage; and (2) the plaintiff is to be put in the same position as he would have been in had he not sustained the wrong: *Livingstone v Rawyards* [1880] 5 App Cas 25 at 39. See, however notes 5, 11 infra.

2 *Nocton v Lord Ashburton* [1914] AC 932, HL; *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421 at 434, [1995] 3 All ER 785 at 793-794, HL, per Lord Browne-Wilkinson.

3 *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421 at 434, [1995] 3 All ER 785 at 793-794, HL, per Lord Browne-Wilkinson, citing *Caffrey v Darby* (1801) 6 Ves 488; *Clough v Bond* (1838) 3 My & Cr 490.

4 *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421 at 434, [1995] 3 All ER 785 at 793-794, HL, per Lord Browne-Wilkinson, citing Underhill and Hayton *Law of Trusts and Trustees* (14th Edn, 1987) pp 734-736; *Bartlett v Barclays Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139; *Bartlett v Barclays Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92; *Re Dawson* [1966] 2 NSW 211. See also *Maguire v Makaronis* (1997) 188 CLR 449 at 469-470.

5 *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421 at 434, 438-439, [1995] 3 All ER 785 at 793-794, HL, per Lord Browne-Wilkinson; cf Millett 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214 at 224-227 (where it is suggested that equity should apply the common law rules as to causation and remoteness in toto).

6 *Maguire v Makaronis* (1997) 188 CLR 449 at 470; *Bennett v Minister for Community Welfare* (1992) 176 CLR 408 at 426-427 per McHugh J.

7 *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421 at 434, [1995] 3 All ER 785 at 794, HL, per Lord Browne-Wilkinson. See also *Re Miller's Deed Trusts* [1978] 75 LS Gaz R 454; *Nestlé v National Westminster Bank plc* [1994] 1 All ER 118, [1993] 1 WLR 1260, CA.

8 *Target Holdings Ltd v Redferns (a firm)* [1996] AC 424 at 439, [1995] 3 All ER 785 at 798, HL, per Lord Browne-Wilkinson. The measurement of compensation by reference to what would have been received but for the breach of trust requires, prima facie, an answer to the question what would have happened if the breach had not been committed: *Bristol and West v May May and Merrimans (a firm)* [1996] 2 All ER 801 at 823-825 and 829-833, per Chadwick J; see also *Bishopsgate Investment Management Ltd (in liquidation) v Maxwell (No 2)* [1994] 1 All ER 261, [1993] BCLC 1282, CA; *Alliance and Leicester Building Society v Edgestop* [1994] 2 All ER 38, [1993] 1 WLR 1462.

9 *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421 at 437, [1995] 3 All ER 785 at 794, HL, per Lord Browne-Wilkinson; approving *Re Dawson* [1966] 2 NSW 211; distinguishing *Alliance and Leicester Building Society v Edgestop Ltd* [1994] 2 All ER 38, [1993] 1 WLR 1462; *Bishopsgate Investment Management Ltd (in liquidation) v Maxwell (No 2)* [1994] 1 All ER 261, [1993] BCLC 1282, CA; *Nant-y-glo and Blaina Ironworks Co v Grave* (1878) 12 ChD 738; and overruling *Jaffray v Marshall* [1994] 1 All ER 143, [1993] 1 WLR 1285.

10 *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421 at 435, [1995] 3 All ER 785 at 794, HL per Lord Browne-Wilkinson; approving *Bartlett v Barclays Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139; *Bartlett v Barclays Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92.

11 *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421 at 436, [1995] 3 All ER 785 at 795, HL per Lord Browne-Wilkinson. For a criticism of this proposition see Millett 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214 at 224-225.

12 Thus it has been said that causation, foreseeability and remoteness do not apply in assessing compensation for breach of equitable duty: *Bennett v Minister for Community Welfare* (1992) 176 CLR 408; *Hill v Rose* [1990] VR 129.

13 *Brickenden v London Loan & Savings Co* (1934) 3 DLR 465 at 469, PC. It was held that a fiduciary who failed in his duty to disclose could not maintain that disclosure would not have affected the client's course of action on the ground that once the non-disclosed facts were held to be material the course to be taken by the client on disclosure was not relevant. *Brickenden v London Loan & Savings Co* supra was explained in *Swindle v Harrison* [1997] 4 All ER 705 at 726, [1997] PNLR 641, CA, per Hobhouse LJ as not being concerned with

compensation for loss; but cf *Maguire v Makaronis* (1997) 188 CLR 449 at 470-471. In *Swindle v Harrison* supra at 717 per Evans LJ, the *Brickenden v London Loan & Savings Co* supra approach was treated as applicable only to cases of fraud, as to which see Tjio and Yeo 'Limited Liability for Breach of Fiduciary Duty' (1998) 114 LQR 181 where this proposition is criticised.

*Brickenden v London Loan & Savings Co* supra has been applied by intermediate courts of appeal in Australia and New Zealand: see *Gemstone Corp of Australia Ltd v Grasso* (1994) 62 SASR 239 at 243, 252; *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 at 93; *Witten-Hannah v Davis* [1995] 2 NZLR 141 at 148; *Haira v Burbury Finance & Savings Ltd (In Receivership)* [1995] 3 NZLR 396 at 407-408.

The policy in holding the trustee up to his obligation to perform the trust which underlies the assessment of compensation for breach of trust is strongly manifested in the cases in which loss is occasioned upon breach of fiduciary duty arising from conflict between duty and interest, notwithstanding the significant differences between a breach of trust and breaches of other fiduciary duties: see *Maguire v Makaronis* supra at 473-474; *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 at 146 per La Forest J; cf at 162 per McLachlin J dissenting.

14 *Canson Enterprise Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 at 160 per McLachlin J.

15 *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 at 149 per La Forest J following *Day v Mead* [1987] 2 NZLR 443 at 451 per Cooke P (the difference between damages and compensation is in many cases 'a distinction without a difference'). See also Millett 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214 at 225. See also *Swindle v Harrison* [1997] 4 All ER 70 at 727, [1997] PNLR 641, CA, per Hobhouse LJ (where a common law approach to causation seems to be applied). As to mitigation and contributory negligence as possible defences to breach of fiduciary duty see *Corporacion Nacional del Cobre de Chile v Sogemin Metals Ltd* [1997] 2 All ER 917 at 924-925, [1997] 1 WLR 1396 at 1402-1405, per Carnworth J. It was held that the plaintiff is disentitled only if he is the author of his own misfortune so that he is the cause of his loss.

16 *Bristol and West Building Society v Mothew* [1998] Ch 1, [1996] 4 All ER 698, CA, (where the common law rule as to causation was applied); *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 at 147-151 per La Forest J following *Day v Mead* [1987] 2 NZLR 443 at 451 per Cooke P. See also Millett 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214 at 225.

17 *Target Holdings Ltd v Redferns (a firm)* [1996] AC 424 at 438, [1995] 3 All ER 785 at 797, HL per Lord Browne-Wilkinson.

18 *Swindle v Harrison* [1997] 4 All ER 707 at 733-735, CA, [1997] PNLR 641, CA, per Mummery LJ; following *Target Holdings Ltd v Redferns (a firm)* [1996] AC 424 at 439, [1995] 3 All ER 785 at 798, HL, per Lord Browne-Wilkinson; *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365, HL. Cf the approach taken by the High Court of Australia: *Maguire v Makaronis* (1997) 188 CLR 449, Aust HC. See also *Corporacion Nacional del Cobre de Chile v Sogemin Metals Ltd* [1997] 2 All ER 917 at 924-925, [1997] 1 WLR 1396 at 1402-1405, per Carnworth J (where the plaintiff's contributory negligence was held not to amount to a breach of fiduciary duty unless it was so egregious that he was the author of his own misfortune so that his conduct was the cause of the loss).

19 *Hodgkinson v Simms* [1994] 3 SCR 377 at 441, per La Forest J; *Haira v Burbury Mortgage Finance & Savings Ltd* [1995] 3 NZLR 396; and see *Everist v McEvedy* [1996] 3 NZLR 348. See also Tjio and Yeo 'Limited Liability for Breach of Fiduciary Duty' (1998) 114 LQR 181 at 185.

20 *Target Holdings Ltd v Redferns (a firm)* [1996] AC 424 at 432, 439, [1995] 3 All ER 785 at 792, 798, HL, per Lord Browne-Wilkinson; *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191, [1996] 3 All ER 365, HL; *Swindle v Harrison* [1997] 4 All ER 707 at 733-735, CA, [1997] PNLR 641, CA, per Mummery LJ; *Maguire v Makaronis* (1997) 188 CLR 449.

21 *Hill v Rose* [1990] VR 129 at 143 per Tadgell J.

22 *Mahoney v Purnell* [1996] 3 All ER 61; see also *O'Sullivan v Management Agency & Music Ltd* [1985] QB 428, 3 All ER 351, CA.

23 See *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 128 ALR 201.

## UPDATE

### 1130 Award and assessment of equitable compensation

NOTES 12-20--Where the breach of fiduciary duty involves non-disclosure or misrepresentation, the test is to assess what would have happened if the duty had

been correctly performed, or, where the court is unable to draw such an inference from the evidence as to the outcome, to place the beneficiary in the position he would have been in had the breach not occurred, assuming that he can prove that he would not have acted in the manner which led to the loss: *Nationwide Building Society v Various Solicitors (No 3)* (1999) Times, 1 March.

NOTE 15--Where a breach of fiduciary duty involves conscious disloyalty, the fiduciary cannot claim that the beneficiary contributed to his loss: *Nationwide Building Society v Various Solicitors (No 3)* (1999) Times, 1 March.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/9. DAMAGES IN EQUITY/1131. Interest under the equitable jurisdiction.

### **1131. Interest under the equitable jurisdiction.**

Under its equitable jurisdiction, the court has the ability to award interest as ancillary relief to its equitable remedies, such as taking an account, specific performance and rescission. The jurisdiction permits the court to award either simple or compound interest. The latter form of interest will be awarded in appropriate cases, such as where an allegation of fraud has been made good or where it has been misused by a fiduciary<sup>1</sup>. It is necessary for the pleader to set out the facts and circumstances relied upon as bringing the case within the court's equitable jurisdiction. Moreover it is necessary to plead those particular facts and matters which give rise to a claim for compound interest<sup>2</sup>.

If the claim put forward is for special loss or damage in the form of additional interest or charges which have become payable by the plaintiff as a result of the defendant's breach of contract, then such sums are payable when the contract expressly provides for the payment of such sums<sup>3</sup>.

Alternatively, interest would be recoverable in law as special damages in a claim for late payment of a debt<sup>4</sup>. The sum is payable only under the second limb of the rule in *Hadley v Baxendale*<sup>5</sup>. Accordingly any pleading must set out any special additional facts or special knowledge which are said to extend the horizon of contemplation beyond those damages which might be within the reasonable contemplation of the parties as being liable to result in the normal course of events<sup>6</sup>. No interest is payable for late payment of damages other than the statutory discretionary award of interest. There is no such thing as a cause of action for the payment of damages from the late payment of damages, the assumption being that the statutory award of interest will meet any such loss<sup>7</sup>. The pleader will be required specifically to plead and to prove his claim<sup>8</sup>. This is typically done either as interest in fact paid or as the sum which would otherwise have been earned on investment<sup>9</sup>.

1 *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA; cf *Mathew v Sutton Ltd* [1994] 4 All ER 793, [1994] 1 WLR 1455.

2 *Practice Note (Claims for Interest) (No 2)* [1983] 1 All ER 934, [1983] 1 WLR 377. Where interest is claimed under a contract, the plaintiff must set out the terms of the agreement relied upon, and the facts and matters relied upon in support of the contention that contractual interest is payable. The pleading should also state between what dates and at what rate on what sum the contractual interest is claimed.

3 See *FG Minter v Welsh Health Technical Service Organisation* (1980) 13 BLR 1 where the court was willing to treat the words 'direct loss and or expense' in the 1963 JCT standard form of building contract as encompassing a claim for finance charges on primary loss and expense and to include payment of interest. See also *Rees & Kirby Ltd v Swansea City Council* (1985) 30 BLR 1 qualifying the application of that provision.

4 *President of India v La Pintada Cia Navigacion SA* [1985] AC 104, [1984] 2 All ER 773, HL.

5 *Wadsworth v Lydall* [1981] 2 All ER 401, [1981] 1 WLR 598, CA; *President of India Cia Navigacion SA* [1985] AC 104, [1984] 2 All ER 773, HL.

6 *Hadley v Baxendale* (1854) 9 Exch 341 at 354 ( see PARA 1015 ante); *Koufos v Czarnikow Ltd* [1969] 1 AC 350 at 416, sub nom *Koufos v Czarnikow Ltd, The Heron II*, [1967] 3 All ER 686 at 711-712, HL, per Pearce LJ; *Koch Marine Inc v d'Amica Societa di Navigazione a r l* [1980] 1 Lloyd's Rep 75 at 87.

7 *President of India v Lips Maritime Corpn* [1988] AC 395, [1987] 3 All ER 110, HL.

8 *Hutchinson v Harris* (1978) 10 BLR 19 at 42.

9 *Brandeis Goldschmidt & Co v Western Transport* [1981] QB 864, [1982] 1 All ER 28, CA.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/10. DAMAGES IN FOREIGN CURRENCY/1132. Modern basis of law.

## 10. DAMAGES IN FOREIGN CURRENCY

### 1132. Modern basis of law.

It was for many years settled law that an English court could give a money judgment only in sterling, whether the claim was for debt<sup>1</sup>, damages for tort<sup>2</sup>, damages for breach of contract<sup>3</sup>, or for breach of trust<sup>4</sup>. It was thought that though foreign currencies changed in their value, the pound sterling did not.

However, this principle was eroded over time, first when it was held that arbitrators could make awards in foreign currencies<sup>5</sup>, and secondly when it was decided that judgments in foreign currencies were permissible in claims for contractual debts where the currency of account and payment were foreign<sup>6</sup>. It was also held<sup>7</sup> that a resident of a fellow member of the European Community was entitled to receive judgment in the currency of his country of residence, but this is almost certainly no longer good law<sup>8</sup>. Shortly afterwards, the existing structure crumbled away when the House of Lords established the law on a new footing<sup>9</sup>.

It was established<sup>10</sup> (1) that there was no substantive or procedural bar to an English court giving judgment in a currency other than sterling; (2) that the English court could as a matter of law give judgment for sums payable (and enforceable) in a foreign currency; and (3) that it was for the courts to work out the detailed application of this principle in the different classes of case which might subsequently come before it.

There is no authority on the question of whether the rules governing the grant of judgments in foreign currencies is substantive or procedural<sup>11</sup>, but it seems likely that the rules governing the selection of the currency of judgment are substantive and the only procedural dimensions are (a) the absence of any rule that judgments may not be given in a foreign currency and (b) the particular mechanisms whereby the court offices record judgments and provide means of enforcement<sup>12</sup>.

1 *Re United Railways of Havana and Regla Warehouses Ltd*[1961] AC 1007, [1960] 2 All ER 332, HL.

2 *SS Celia (Owners) v SS Volturno (Owners)*[1921] 2 AC 544, HL.

3 *Di Ferdinando v Simon Smits*[1920] 3 KB 409, CA.

4 *Re Chesterman's Trusts, Mott and Browning*[1923] 2 Ch 466, CA.

5 *Jugoslovenska Oceanska Plovidba v Castle Investment Co Inc*[1974] QB 292, [1973] 3 All ER 498, CA.

6 *Schorsch Meier GmbH v Hennin*[1975] QB 416, [1975] 1 All ER 152, CA.

7 *Schorsch Meier GmbH v Hennin* [1975] QB 416, [1975] 1 All ER 152, CA. This case was decided pursuant to the EC Treaty (The Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) art 106.

8 This ground of the decision in *Schorsch Meier GmbH v Hennin* [1975] QB 416, [1975] 1 All ER 152, CA, has not been formally overruled, but was disapproved of in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 1 All ER 1076, HL.

9 See *Miliangos v George Frank (Textiles) Ltd*[1976] AC 443, [1975] 1 All ER 1076, HL, a landmark decision from which all subsequent principles have been derived.

10 See *Miliangos v George Frank (Textiles) Ltd*[1976] AC 443, [1975] 1 All ER 1076, HL.

11 See CONFLICT OF LAWS vol 8(3) (Reissue) PARA 22.

12 See PARA 1143 post; and CIVIL PROCEDURE.

## **UPDATE**

### **1132-1144 Damages in Foreign Currency**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/10. DAMAGES IN FOREIGN CURRENCY/1133. Breach of contract: claims for debts.

### 1133. Breach of contract: claims for debts.

After the change in direction of the law<sup>1</sup>, it became clear that at least some debts which should properly be expressed in a foreign currency could be recovered by a judgment for the appropriate amount of that currency (or its sterling equivalent at the date of payment)<sup>2</sup>. The case which reversed previous decisions was concerned with a contract governed by a foreign system of law, and where the money of account and payment were also of the same state<sup>3</sup>. It is now clear that a judgment can be given for a debt expressed in a foreign currency if the currency of account and payment are a foreign currency, even if the proper law of the contract is English<sup>4</sup>. If the currency of account is foreign and the currency of payment is sterling, it seems that the judgment will still be given for the sum expressed in the currency of account<sup>5</sup>. It follows that if the currency of account is one foreign currency and the currency of payment is another, judgment will be usually be given for the debt expressed in the currency of account.

One exception to this may arise where the contract itself provides for a particular rate of exchange between the currency of account and the currency of payment by reference to the exchange rate prevailing on a given day<sup>6</sup>. In such a case, it seems that the judgment will be given in the currency of payment<sup>7</sup>. (The true explanation is probably that there has been a change in the currency of account.) Where a debt is owed and the creditor is paid late, it seems that damages may be recovered for exchange losses if they are the natural consequence of the breach. It is not necessary to demonstrate that such specific losses were within the reasonable contemplation of both parties at the time of contracting<sup>8</sup>.

1 See *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 1 All ER 1076, HL; and PARA 1132 ante.

2 See *Practice Direction (Judgment: Foreign Currency)* [1976] 1 All ER 669, [1976] 1 WLR 83; *Practice Direction (Judgment: Foreign Currency) (No 2)* [1977] 1 All ER 544, [1977] 1 WLR 197.

3 See *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 1 All ER 1076, HL. Although these features of the transactions were specifically referred in the leading speech of Lord Wilberforce, there would have been problems if they had turned out to be prerequisites of recovery of judgment in a foreign currency. For example, the currency most often used in international transactions is the US dollar, which is not linked to any single system of law. *Jean Kraut A-G v Albany Fabrics Ltd* [1977] QB 182, [1977] 2 All ER 116 was the same in this respect as *Miliangos v George Frank (Textiles) Ltd* supra, although regard had to be had to the Swiss characterisation to enable the case to be treated as a claim of debt.

4 In *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 1 All ER 1076, HL, it was held that the rule applied 'at least' where the proper law of the contract was not English. The principle was extended to English law contracts by such cases as *Barclays Bank International Ltd v Levin Bros (Bradford) Ltd* [1977] QB 270, [1976] 3 All ER 900; *Veflings Rederi AS v President of India, The Bellami* [1978] 3 All ER 838, [1979] 1 WLR 59, CA; *Federal Commerce and Navigation v Tradax Export SA* [1977] QB 324, [1977] 2 All ER 41, CA.

5 *Veflings Rederi AS v President of India, The Bellami* [1978] 3 All ER 838, [1978] 1 WLR 982. This case and *Federal Commerce and Navigation v Tradax Export SA* [1977] QB 324, [1977] 2 All ER 41, CA were concerned with claims for demurrage. These are not claims for debt but for liquidated damages: see eg *President of India v Lips Maritime Corp* [1988] AC 395, [1987] 3 All ER 110, HL. Nonetheless, the courts proceeded on this mistaken basis and the decisions are authoritative on the rules applying to debts.

6 *President of India v Taygetos Shipping Co SA* [1985] 1 Lloyd's Rep 155; *President of India v Lips Maritime Corp* [1988] AC 395, [1987] 3 All ER 110, HL.

7 *President of India v Taygetos Shipping Co SA* [1985] 1 Lloyd's Rep 155.

8 *President of India v Lips Maritime Corp* [1988] AC 395, [1987] 3 All ER 110, HL, distinguishing *President of India v La Pintada Shipping Corp* [1985] AC 104, [1984] 2 All ER 773, HL. In *International Minerals & Chemical*

*Corpn v Karl O Helm A-G* [1986] 1 Lloyd's Rep 81 at 104 per Hobhouse J, it was held that damages for exchange losses were recoverable only if they fell within the second limb of *Hadley v Baxendale* (1854) 9 Exch 341 (see PARA 1015 ante). This proposition was rejected in *President of India v Lips Maritime Corpn* supra at 119-120 per Lord Mackay. Although the decision in *International Minerals & Chemical Corpn v Karl O Helm A-G* supra directly to the contrary effect was apparently not cited, the judgment of Hobhouse J was founded on the decision in *President of India v La Pintada Shipping Corpn* supra, and it seems that it does not represent the law.

## **UPDATE**

### **1132-1144 Damages in Foreign Currency**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/10. DAMAGES IN FOREIGN CURRENCY/1134. Breach of contract: claims for damages.

### **1134. Breach of contract: claims for damages.**

There are two strands running through the change of law on damages in foreign currency<sup>1</sup>. One is that there is an appropriate currency for any given claim and that it is the court's task to allow the claim to be proved in that currency so far as possible. The other is based on the idea that judgments are ultimately enforceable in England in sterling and that the rules relating to foreign currency claims are directed at fixing an exchange date which best achieves justice.

This distinction is important because the first approach treats currency exchange as extraneous, whereas it is a central mechanism for the second<sup>2</sup>.

The tendency to regard foreign money as a thing, and the manipulation of the date of exchange as a central part of the court's function in such instances, has persisted<sup>3</sup>. Nonetheless, the dominant attitude of the courts has been simply to treat foreign money as money<sup>4</sup>.

Where an action is brought on a contract for the sale of goods for damages for non-acceptance, and the proper law, the money of account and the money of payment all relate to the same country<sup>5</sup>, the plaintiff may recover damages in the currency of that country. Such an award may also be made even if the contract is governed by English law<sup>6</sup>. This was held to be so where, under the proper law of the contract, the claim was properly to be characterised as a claim for debt<sup>7</sup>, but there is a more general rule that where damage has been suffered as a result of a breach of contract where there are foreign elements in the transaction or the loss, the court may award damages in the appropriate currency<sup>8</sup>.

Superficially, it appeared logical that if a contract provided for a currency of account or a currency of payment, that must be the appropriate currency in which to express the damages payable. On the other hand, while debts were specifically monetary obligations resting on one party to the contract, one who was required to pay damages for breach of contract might be the party who was to provide goods or services under the contract and who was not envisaged as having any monetary obligations<sup>9</sup>. Whereas, in claims for debts<sup>10</sup>, the choice was clearly between sterling and the currency of the contract, in actions for damages, the currency of the contract will often be irrelevant to the losses suffered by the innocent party. Those losses might take a variety of forms: there might be expenditure thrown away in anticipation of performance by the other party; loss of the profits which would have flowed from other contractual arrangements into which the innocent party had entered; or expenses incurred by that party in putting himself in the same position as if the contract had been performed.

There was no necessary connection between losses of those kinds and the currency specified expressly or impliedly by the contract for the discharge of monetary obligations. In response to questions of this kind, it was initially held that, where the result of the breach of contract was that the innocent party had had to incur expenses or make disbursements, the appropriate currency for measuring the loss was the one in which those expenses were incurred or disbursements made<sup>11</sup>.

However, that was repudiated as a general approach by the House of Lords: instead they held that the general principle governing damages for breach of contract in a foreign currency is of the broadest and most flexible kind<sup>12</sup>. The judgment or award must be made in the currency best suited to achieve an appropriate and just result. This rule is flexible, and account must be taken of the circumstances in which the loss arose, in which the loss was converted into a money sum, and in which it was felt by the plaintiff<sup>13</sup>. In some cases, the 'immediate loss'

currency may be appropriate, in others the currency in which it was borne by the plaintiff. There will be still others in which the appropriate currency is the currency of the contract<sup>14</sup>.

The courts are no longer concerned with the date of exchange but with the identification of the appropriate currency in which to give judgment<sup>15</sup>. The practical difficulties in complex cases are not insurmountable. It is for the plaintiff to prove his loss, and therefore it is for him to establish what his currency is: so far as large multinational companies with accounts in several currencies are concerned, it is up to them to prove that the use of the particular currency was in the course of the normal operations of that company and was reasonably foreseeable<sup>16</sup>.

The rule does not enure for the benefit of plaintiffs only. Every claim has its own appropriate currency<sup>17</sup>, and either party may seek to prove what that currency is. If the objectively correct currency for the award has fallen against other currencies, the plaintiff's entitlement is commensurately reduced, even if that results in a catastrophic reduction in the real value of the damages to which he is entitled<sup>18</sup>. Accordingly, there is always a currency which may be termed 'the proper currency of the loss'. It is the task of the court to identify that currency, and to give judgment in it. It follows from this that the flexibility of the rule is related only to the identification of the loss suffered by the plaintiff: the position of the defendant is therefore ignored.

Where the plaintiff will suffer exchange losses as a result of the defendant's breach of contract unless he recovers damages in a particular currency, the defendant is unable to put forward any hardship he might suffer if the plaintiff is given a judgment in a form which will insulate him against such losses. The converse is also true. Where the innocent party will suffer an exchange loss if he recovers in what is the appropriate currency, it is irrelevant that the defendant may thereby obtain a considerable exchange benefit<sup>19</sup>.

1 *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 1 All ER 1076, HL.

2 The leading speech of Lord Wilberforce in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 1 All ER 1076, HL, reflects both of these approaches. So far as general unliquidated damages for breach of contract are concerned, all that was done was to add the possible qualification to the existing law that the mere fact that as a general rule in English law, damages for tort or breach of contract are assessed as at the date of breach need not preclude, in particular cases, the conversion into sterling of an element in the damages which arises and is expressed in foreign currency, at some later date. This has had some effect on subsequent authorities: *Services Europe Atlantique Sud (SEAS) v Stockholms Rederiaktiebolag SVEA, The Folias* [1979] QB 491 at 501 and 504-505, [1977] 3 All ER 945 at 951-952 per Goff J; *The Texaco Melbourne* [1992] 1 Lloyd's Rep 303 at 316 per Webster J.

3 It reappeared most recently in *The Texaco Melbourne* [1994] 1 Lloyd's Rep 473, HL.

4 The courts have used *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 1 All ER 1076, HL, as a tool for resetting the whole of the law of foreign money obligations.

5 *Jean Kraut A-G v Albany Fabrics Ltd* [1977] QB 182, [1977] 2 All ER 116.

6 *Federal Commerce and Navigation v Tradax Export SA* [1977] QB 324, [1977] 2 All ER 41, CA (decision was chiefly concerned with the validity of a notice of readiness, upon which point it was reversed: see [1978] AC 1, HL).

7 In *Jean Kraut A-G v Albany Fabrics Ltd* [1977] QB 182, [1977] 2 All ER 116 this was relied on as a matter which enabled the English court to grant damages in the foreign currency; but the characterisation of the foreign court has not been relied on in any subsequent authority and cannot be justified in principle.

8 In *Federal Commerce and Navigation v Tradax Export SA* [1977] QB 324, [1977] 2 All ER 41, CA, it was expressly stated that judgments for damages for breach of contract as well as for debts could be made in foreign currencies. It was in fact overlooked that this was crucial, because the court mistakenly characterised demurrage as a debt: in reality it is liquidated damages for delay: see *President of India v Lips Maritime Corp* [1988] AC 395, [1987] 3 All ER 110, HL.



9 Unless the language of primary and secondary obligations in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848-851, [1980] 1 All ER 556 at 565-568, HL, per Lord Diplock is used; but this terminology is unhelpful, at least in the present context.

10 See PARA 1133 ante.

11 *Services Europe Atlantique Sud (SEAS) v Stockholms Rederiaktiebolag SVEA, The Folias* [1979] AC 685, [1979] 1 All ER 421, HL.

12 See note 11 supra.

13 See note 11 supra.

14 See note 11 supra.

15 See note 11 supra.

16 See note 11 supra.

17 *President of India v Taygetos Shipping Co SA* [1985] 1 Lloyd's Rep 155.

18 *The Texaco Melbourne* [1994] 1 Lloyd's Rep 473, HL.

19 See Knott 'The Currency of Damages in Contract' [1994] LMCLQ 311.

## **UPDATE**

### **1132-1144 Damages in Foreign Currency**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/10. DAMAGES IN FOREIGN CURRENCY/1135. Contract claims: general principles.

### **1135. Contract claims: general principles.**

Within the flexible criterion of identifying the currency in which the plaintiff has felt his loss, there are principles which enable the parties to identify it, which have been stated as follows<sup>1</sup>:

- 87 (1) where it is inappropriate to give judgment in sterling but there is more than one eligible foreign currency, the choice must depend on general principles of the law of contract and rules of conflict of laws;
- 88 (2) general contractual principles require the application, so far as possible, of the principle of *restitutio in integrum*, regard being had to what was in the reasonable contemplation of the parties;
- 89 (3) where the proper law of the contract is English, the first step is to see whether, expressly or by implication, the contract provides an answer to the currency question;
- 90 (4) if the contract does show an agreed currency of account and payment, then judgment can be given in that currency as the proper currency of the contract, which is the currency with which payments under the contract have the closest and most real connection;
- 91 (5) if the contract does not show an agreed currency of account and payment, the plaintiff should receive damages calculated in the currency in which the loss was felt or which most truly expresses his loss, which may or may not be the currency in which the loss first and immediately arose. In ascertaining which this currency is, the court must ask what is the currency in which payment will as nearly as possible compensate the plaintiff in accordance with the principle of restitution and whether the parties must be taken reasonably to have had this in contemplation;
- 92 (6) a decision in what currency a loss was felt or borne can be expressed as equivalent to a finding which currency sum most appropriately or justly reflects the recoverable loss.

The first principle draws attention to the fact that the necessity to choose between foreign currencies arises only when it is inappropriate to make an award in sterling. It is thought that the consequence is that the burden of proof has to be considered in two stages, first in relation to the question of whether the case is a non-sterling case at all, and secondly, when it is, as between two competing foreign currencies. It is rare that cases are decided on the burden of proof, but in the claims brought by states or multinational companies arising out of international transactions, it may be very difficult to establish what is the proper currency of the loss even if the evidence is all available<sup>2</sup>.

There has as yet been no authoritative guidance as to the type of discovery which will need to be given to deal with such issues. In particular, governments and multi-national companies operate through many sub-organisations and may hold many currencies<sup>3</sup>.

Even if current proposals for an etiolated discovery regime are brought into force, it is hard to see how fair results can be achieved (in accordance with the sixth principle set out above) unless the claimant is required to disclose the material which will enable the defendant to plead and prove an appropriate currency for recovery.

Both the second and fifth principles<sup>4</sup> refer to what the parties must reasonably have had in contemplation as the currency in which damages are to be awarded. Although this appears to

be inconsistent with the generally objective test which has regard only to the position of the plaintiff<sup>5</sup>, these principles have the result that a defence of 'remoteness of currency' is available in appropriate cases. Accordingly, where the plaintiff has suffered loss in circumstances in which the defendant could not reasonably have contemplated that the currency in which the loss was ultimately felt was a relevant one, the plaintiff is unable to recover in that currency<sup>6</sup>.

The third and fourth principles<sup>7</sup> provide possible ways of simplifying the process of identifying the currency in which to give judgment. The third principle looks to the terms of the agreement itself: if the parties have agreed a currency of account and of payment, the courts will give effect to that choice. Generally it is only the currency of account which provides a proper measure of the loss, and the cases where the currency of payment is the chosen currency for the award of damages are probably to be viewed as instances of the currency of account changing at a particular date pursuant to the terms of the contract<sup>8</sup>.

Although the fourth principle<sup>9</sup> is in terms limited to cases where the contract is governed by English law, the same approach ought to be adopted even if the proper law of the contract is foreign<sup>10</sup>. Any rule of the relevant foreign law as to the currency in which judgments are to be given (as opposed as rules of construction which enabled the currency chosen by the parties in their agreement to be identified) would be a matter of procedure. It is thought that despite their apparent width, the third and fourth principles<sup>11</sup> are of very narrow application. They will rarely be available in claims for unliquidated general damages for breach of contract. They are primarily directed at cases not merely where liquidated damages are claimed but where the parties have addressed their minds specifically to the currency in which those damages are to be paid<sup>12</sup>, a question with which most contracts do not deal specifically<sup>13</sup>.

The fifth principle, that in the absence of any other indication, the tribunal must look for 'the currency in which the loss was felt or which most truly expresses his loss' is the normal and not the exceptional case<sup>14</sup>.

1 *Société Française Bunge SA v Belcan NV, The Federal Huron* [1985] 3 All ER 378 at 380-381, [1985] 2 Lloyd's Rep 189 at 190 per Bingham J. This set of principles was incorporated bodily into *Empresa Cubana Importadora de Alimentos v Octavia Shipping Co SA, The Kefalonia Wind* [1986] 1 Lloyd's Rep 273, 292n. See also *The Texaco Melbourne* [1993] 1 Lloyd's Rep 471 at 486-487, CA, per Glidewell LJ.

2 This was the difficulty foreseen by Lord Goff in *Services Europe Atlantique Sud (SEAS) v Stockholms Rederiaktiebolag SVEA, The Folias* [1979] QB 491 at 504-505, [1977] 3 All ER 945 at 954-955. On appeal, Lord Wilberforce thought the difficulties exaggerated: see *Services Europe Atlantique Sud (SEAS) v Stockholms Rederiaktiebolag SVEA, The Folias* [1979] AC 685 at 698, [1979] 1 All ER 421 at 427, HL; and in *The Texaco Melbourne* [1994] 1 Lloyd's Rep 473 at 478, HL, Lord Goff referred to, but did not reiterate, his earlier view.

3 Cf the effect of hedging in *International Minerals & Chemical Corp'n v Karl O Helm* [1986] 1 Lloyd's Rep 81. Very extensive investigation of their financial affairs would be justified by the test in *Compagnie Financière du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, CA, whereby all documents are disclosable if it is reasonable to suppose that they contain information which may advance one party's case or damage that of his adversary or which may fairly lead him to a train of inquiry which may have either of these two consequences.

4 See PARA 1134 ante.

5 See PARA 1134 notes 17-18 ante.

6 *Metaalhandel JA Magnus BV v Ardfields Transport Ltd* [1988] 1 Lloyd's Rep 197, (1987) Financial Times, 21 July. There are obvious difficulties in the idea of a party contemplating the currency consequences of a breach of contract, even though (in the ordinary case) neither party contemplates a breach of contract at all. This seems to have been a clear case for a guilder judgment; and the fact that one was not achieved indicates that identifying the appropriate currency is not always straightforward.

7 See PARA 1133 ante.

8 See notes 5-7 supra; and PARA 1133 ante.

9 See PARA 1135 ante.

10 The third principle must be viewed in the context of the specific dispute before the court in *Société Française Bunge SA v Belcan NV, The Federal Huron* [1985] 3 All ER 378, [1985] 2 Lloyd's Rep 189.

11 See PARA 1135 ante.

12 It appears that in this part of the decision in *Société Française Bunge SA v Belcan NV, The Federal Huron* [1985] 3 All ER 378, [1985] 2 Lloyd's Rep 189 such cases as *Federal Commerce and Navigation v Tradax Export SA* [1977] QB 324, [1977] 2 All ER 41, CA were considered.

13 When analysed, the construction of all contracts which contain any express or implied payment obligations will yield an intention for (at least) one particular currency of account and payment. If the damage which the innocent party suffers has nothing to do with the monetary obligations under the contract, there is no justification for awarding damages in the currency of the contract as such.

14 See *Société Française Bunge SA v Belcan NV, The Federal Huron* [1985] 3 All ER 378, [1985] 2 Lloyd's Rep 189. There the contract of carriage referred only to one currency, US dollars, but this was regarded as of small importance, and the currency was chosen on the basis of the fifth rather than the third and fourth principles.

## **UPDATE**

### **1132-1144 Damages in Foreign Currency**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/10. DAMAGES IN FOREIGN CURRENCY/1136. Treatment of commodities.

### **1136. Treatment of commodities.**

Certain types of transactions in certain types of commodity are universally regarded as being carried out in a particular currency. The courts have approached the position where that currency would govern the whole of the regime for debt and damages arising out of such transactions (soya, for example, has been treated as a 'dollar commodity'<sup>1</sup>), but it is probable that they have now withdrawn from it, with the result that there is no limited class of case where the choice of currency of judgment is governed by this type of wholly objective consideration: in all cases it is necessary to look at the loss which the plaintiff has ultimately suffered<sup>2</sup>.

1 See note 2 infra.

2 In *Société Française Bunge SA v Belcan NV, The Federal Huron* [1985] 3 All ER 378, [1985] 2 Lloyd's Rep 189, having discounted the significance of the reference to dollars in the contract of carriage, it was held that the evidence was overwhelming that the cargo receivers treated soya as a dollar commodity.

If soya is a dollar commodity, it is clear oil must be, but that approach was not taken in *The Texaco Melbourne* [1994] 1 Lloyd's Rep 473, HL, where damages were claimed for breach of a contract of carriage of oil. The judgment was in the currency in which the plaintiff conducted its affairs and not the currency which related to the relevant commodity. The decision has not met with universal approval (see eg Knott 'The Currency of Damages in Contract' [1994] LMCLQ 311). The fact that the House of Lords referred to *Société Française Bunge SA v Belcan NV, The Federal Huron* supra with apparent approval may mean that there is still room for argument.

### **UPDATE**

#### **1132-1144 Damages in Foreign Currency**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/10. DAMAGES IN FOREIGN CURRENCY/1137. Contract claims: exceptions to general principles.

### **1137. Contract claims: exceptions to general principles.**

There is an exception to the general principles set out above<sup>1</sup> in cases where a statutory provision imposes a general restriction on the level of recovery expressed in terms of sterling or some other currency. Thus where damages are claimed under a contract of carriage by sea governed by the Hague Rules (which apply only very rarely today), the value of the recovery is limited to £100 per package or unit<sup>2</sup>.

Under the Hague-Visby Rules<sup>3</sup>, however (which are commonly applicable), the limit is calculated in special drawing rights (SDRs) and the date of exchange is pushed forward. Similar limits apply to claims against shipowners and salvors<sup>4</sup>, against hauliers<sup>5</sup> and against the owners and operators of aircraft<sup>6</sup>. In such cases, it is still necessary to ascertain what the true measure of damages is in accordance with the principles set out above, because the figure must be compared with the statutory limit.

In the case of unliquidated damages for non-pecuniary loss, the plaintiff will recover damages assessed, and usually expressed, in sterling<sup>7</sup>. This principle applies to damages for pain and suffering and loss of amenity. The measure of damages will in such a case be assessed by reference to English standards.

1 See PARA 1135 ante.

2 See the Hague Rules Article IV r 5. For these purposes, £100 means '£100 gold value': r 9. The date of establishing what is £100 'gold value' is the date the cause of action arose and not the date of payment. As to the Hague Rules see CARRIAGE AND CARRIERS vol 7 (2008) PARA 206. See also *The Rosa S* [1989] 1 All ER 489, [1989] 2 Lloyd's Rep 574.

3 As to the Hague-Visby Rules see CARRIAGE AND CARRIERS vol 7 (2008) PARA 206.

4 See the Merchant Shipping Act 1995 s 185, Sch 7 Pt I; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1042 et seq.

5 See the Carriage of Goods by Road Act 1965 s 1, Sch 1 Ch IV art 23 (amended by the Carriage by Air and Road Act 1979 s 4(2)).

6 See the Carriage by Air Act 1961 s 1, Sch 1 Art 22 (amended by the Carriage by Air and Road Act 1979 s 4(1)(a)).

7 *Hoffman v Sofaer* [1982] 1 WLR 1350, 126 Sol Jo 611 (action in tort for medical negligence).

## **UPDATE**

### **1132-1144 Damages in Foreign Currency**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/10. DAMAGES IN FOREIGN CURRENCY/1138. Restitution.

**1138. Restitution.**

Analogous principles apply to restitutionary claims. The court's task is to identify the currency in which the party making the recovery felt his loss<sup>1</sup>. There is no reason why there should not be restitution in different currencies in respect of different parts of the same claim<sup>2</sup>.

<sup>1</sup> *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 985, [1981] 1 WLR 232 at 245, CA, per Lawton LJ; affd [1983] 2 AC 352, HL.

<sup>2</sup> *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 985, [1982] 1 WLR 232 at 243, CA, per Lawton LJ; affd [1983] 2 AC 352, HL. The claim was made pursuant to the Law Reform (Frustrated Contracts) Act 1943, where the court has a discretion as to the sums to be awarded. It remains to be seen whether similar results will be reached in cases where this element of discretion is not present.

It is significant that the sum awarded was sterling so far as investment costs were concerned but US dollars so far as (broadly) the trading costs were concerned. The latter was justified on the ground that oil was always dealt with in US dollars.

**UPDATE**

**1132-1144 Damages in Foreign Currency**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/10. DAMAGES IN FOREIGN CURRENCY/1139. Breach of trust.

**1139. Breach of trust.**

There is as yet no authority on the question of whether or not liability for a breach of trust may be dealt with by way of an award or judgment in a foreign currency<sup>1</sup>. In many situations where a question of breach of trust has arisen, there will be particular reason for an order requiring the payment of a foreign currency, as there is a greater likelihood of the claimant seeking a proprietary remedy and thus recovery in specie.

<sup>1</sup> Although it would seem that the general principle enunciated in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 1 All ER 1076, HL, applies across the board.

**UPDATE**

**1132-1144 Damages in Foreign Currency**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/10. DAMAGES IN FOREIGN CURRENCY/1140. Tort.

### 1140. Tort.

English courts and arbitrators have the power to award damages for tort in a foreign currency where it would be appropriate to do so<sup>1</sup>. Where damages are awarded in this way, judgment will be entered for payment of the foreign currency sum specified by the court or the sterling equivalent at the date of payment<sup>2</sup>. A commercial claimant who normally conducts his business through a particular currency and who, when other currencies are immediately involved, uses his own currency to obtain those currencies, can reasonably say that the loss he sustains should be measured not by the immediate currencies in which the loss first emerges but by the amount of his own currency which, in the normal course of operation, he uses to obtain those currencies<sup>3</sup>: this is an application of the compensatory function of damages<sup>4</sup> and of the requirement of reasonable foreseeability of the damage sustained<sup>5</sup>.

Where this method of determining the proper currency for the award of damages identifies a claimant's currency, it will be because that is the one in which expenditure and loss was effectively felt or borne by the claimant, having regard to the currency (or currencies) in which he generally operated or with which he had the closest connection<sup>6</sup>. This process does not, however, entail the selection of a personal currency attached, like nationality, to a claimant, but a currency that a claimant is able to show is the one in which he normally conducts trading operations, the burden of proof being upon him<sup>7</sup>. Where the solution of the claimant's currency is not appropriate, the normal conclusion will be that the loss is felt in the currency in which it immediately arose<sup>8</sup>.

Where unliquidated damages are awarded for non-pecuniary loss they will be assessed, and usually expressed, in sterling<sup>9</sup>. This principle applies to damages for pain and suffering and loss of amenity and also to general damages for defamation. The measure of damages will in such a case be assessed by reference to English standards.

1 *MV Eleftherotria (Owners) v MV Despina R (Owners), The Despina R* [1979] AC 685, [1979] 1 All ER 421, HL (special damages in an action arising from a collision between ships); applied in *Hoffman v Sofaer* [1982] 1 WLR 1350, 126 Sol Jo 611 (special damages and future loss of earnings, in a claim arising from personal injury: see note 6 infra); *The Lash Atlantico* [1987] 2 Lloyd's Rep 114, CA; *The Transoceanica Francesca and Nicos V* [1987] 2 Lloyd's Rep 155; *The Botany Triad and Lu Shan* [1993] 2 Lloyd's Rep 259 (ship collision cases); and displacing the rule in *Manners v Pearson & Son* [1898] 1 Ch 581 at 587, CA, per Lindley MR which had been applied to damages in tort by *SS Celia (Owners) v SS Volturno (Owners), The Volturno* [1921] 2 AC 544, HL.

2 See *Practice Direction (Judgment: Foreign Currency)* [1976] 1 All ER 669, [1976] 1 WLR 83, as amended by *Practice Direction (Judgment: Foreign Currency) (No 2)* [1977] 1 All ER 544, [1977] 1 WLR 197. This provides that when judgment is entered in a foreign currency the relevant Forms in RSC Appendix A will be amended appropriately. As to enforcement see PARA 1143 post.

3 *MV Eleftherotria (Owners) v MV Despina R (Owners), The Despina R* [1979] AC 685 at 697, [1979] 1 All ER 421 at 427, HL, per Lord Wilberforce. For the treatment of a non-commercial claimant's claim see note 6 infra.

4 See PARAS 815-818 ante.

5 It was recognised that the procedure introduced would lead to some uncertainty: 'To resolve it is part of the normal process of adjudication. To attempt to confine this within a rigid formula would be likely to produce injustices which the courts and arbitrators would have to put themselves to much trouble to avoid': *MV Eleftherotria (Owners) v MV Despina R (Owners), The Despina R* [1979] AC 685 at 697, [1979] 1 All ER 421 at 427, HL, per Lord Wilberforce. As to foreseeability in relation to tort generally see PARA 851 et seq ante.

6 This formulation was used in *MV Eleftherotria (Owners) v MV Despina R (Owners), The Despina R* [1979] AC 685, [1979] 1 All ER 421, HL. In *Hoffman v Sofaer* [1982] 1 WLR 1350, 126 Sol Jo 611, an American citizen who received negligent medical treatment while visiting England, was awarded compensation in US dollars reflecting

expenses incurred on his return to America and future loss of earnings, as that was the currency with which he had the closest connection. General damages for pain and suffering were assessed, and were also expressed, in sterling.

7 *MV Eleftherotria (Owners) v MV Despina R (Owners), The Despina R* [1979] AC 685 at 698, [1979] 1 All ER 421 at 428, HL, per Lord Wilberforce. In *AUX Ltd v EGM Solders Ltd* [1982] CLY 175, (1982) Times 7 July, the plaintiffs, a subsidiary of a US company with a factory in Ireland and a warehouse in England, and whose goods had been damaged by a party in possession who was unaware that they did not belong to the possessor himself, failed to satisfy the court that they should recover damages assessed either wholly in US dollars (the currency in which half the plaintiffs' revenue was earned, and in which they were funded by their American parent corporation), or partly in US dollars and the balance in the other currencies in which revenue was earned. The award was assessed in sterling, based upon the value of the goods when the cause of action arose.

In other cases claimants may be able to satisfy a court that they should recover damages in a mixture of currencies, reflecting their trading activities.

8 However, there remain some areas of difficulty, both in relation to the selection of the judgment currency and other matters: see Knott 'Foreign Currency Judgments in Tort: An Illustration of the Wealth-Time Continuum' (1980) 43 MLR 18.

9 *Hoffman v Sofaer* [1982] 1 WLR 1350. See also note 6 supra.

## **UPDATE**

### **1132-1144 Damages in Foreign Currency**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/10. DAMAGES IN FOREIGN CURRENCY/1141. Interest where judgment expressed in foreign currency.

### **1141. Interest where judgment expressed in foreign currency.**

The general principles governing the allowance of pre-judgment interest where an English judgment is expressed in a foreign currency, are the same as apply where a judgment is expressed in sterling<sup>1</sup>, except that interest will normally be at a rate appropriate to the foreign currency of the judgment<sup>2</sup>.

This takes account of the typical inverse relationship between the strength of a currency and its interest rate, with strengthening currencies generally having lower rates and weakening currencies generally having higher rates<sup>3</sup>. Where a judgment or award is given for a sum expressed in a currency other than sterling<sup>4</sup>, courts and arbitrators now have statutory powers to allow interest on the judgment debt at such rate as they think fit<sup>5</sup>.

1 The broad basis of an award of interest is that the defendant has kept the plaintiff out of money and has had the use of it himself, therefore the plaintiff ought to be compensated. For a non-commercial plaintiff interest will generally be at a deposit rate; in the Commercial Court and Admiralty Court it will generally be at a borrowing rate. As to interest generally see RSC Ord 6 r 2; and PARA 848 ante.

2 *Miliangos v George Frank (Textiles) (No 2)* [1977] QB 489 at 496, [1976] 3 All ER 599 at 602; *Shell Tankers (UK) Ltd v Astro Comino Armadora SA, The Pacific Colocotronis* [1981] 2 Lloyd's Rep 40, [1981] CLY 2507, CA. In the latter it was made clear that with a judgment in a foreign currency, the prima facie rule is that interest should be awarded at a rate appropriate to that currency.

With a contractual claim for interest, the proper law of the contract determines both the entitlement to interest and the rate of interest. In a claim for damages, there is some support for the view that the question of whether a claimant should recover interest is substantive, and is one for the proper law of the contract or the law governing the tortious liability, as appropriate, whereas the question of the rate of interest is procedural; but this distinction is not universally accepted: see eg *Private International Law: Foreign Money Liabilities* (Law Com no 124) (1983).

In practice, the effect of any distinction may sometimes be blurred by the Admiralty Court's separate jurisdiction, in collision and related matters such as salvage, to award interest, and the treatment, on occasion, of such interest as part of the damages: see *The Kong Magnus* [1891] P 223, 7 Asp 64 (collision); *The Joannis Vatis (No 2)* [1922] P 213, 15 Asp 506 (collision); *The Aldora* [1975] QB 748, [1975] 2 All ER 69 (interest on a salvage award); *The Botany Triad and The Lu Shan* [1993] 2 Lloyd's Rep 259 (collision); *Law of Contract: Report on Interest* (Law Com no 88; Cmnd 7229) (1978); and by the power the court has to curtail the period (or abridge the rate) for which interest is awarded: see eg *The Texaco Melbourne* [1992] 1 Lloyd's Rep 303, (1991) Financial Times, 7 August.

3 The different approach adopted in *Helmsing Schiffahrts GmbH & Co KG v Malta Drydock Corpn* [1977] 2 Lloyd's Rep 444 (a claim brought in Maltese pounds with an award of interest expressed in Maltese pounds but calculated at Deutschmark rates), which displaced the prima facie rule, was noted without disapproval in *Shell Tankers (UK) Ltd v Astro Comino Armadora SA, The Pacific Colocotronis* [1981] 2 Lloyd's Rep 40, [1981] CLY 2507, CA.

4 And where, as will be usual, the judgment is one to which the Judgments Act 1838 s 17 (as amended) applies: see PARA 848 note 2 ante.

5 See the Administration of Justice Act 1970 s 44A(1) (added by the Private International Law (Miscellaneous Provisions) Act 1995 s 1). A similar provision applies to county courts: see the County Courts Act 1984 s 74(5A) (added by the Private International Law (Miscellaneous Provisions) Act 1995 s 2).

There are, however, special rules relating to the awarding of interest on some registered foreign judgments (for the enforcement of which see PARA 1143 post), which restrict the court's scope. In relation to a foreign judgment for the payment of a sum of money to which the Civil Jurisdiction and Judgments Act 1982 ss 4, 5 (as amended) apply, s 7 provides that where the applicant for enforcement shows that interest is recoverable on the judgment under the law of the contracting state in which the judgment was given, details of the applicable rate of interest and the time from which interest runs are to be registered with the judgment, and the debt (save for any element representing costs), is to carry interest in accordance with the registered particulars.

**UPDATE**

**1132-1144 Damages in Foreign Currency**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/10. DAMAGES IN FOREIGN CURRENCY/1142. Set-off between claims in different currencies.

### **1142. Set-off between claims in different currencies.**

In Admiralty collision actions, where claims and cross-claims often need to be set off against each other, a detailed procedure has evolved under which the smaller recovery is first converted to the currency of the larger recovery, as at the date on which the claims are determined by the court or by agreement, and judgment is then given for the balance after set-off<sup>1</sup>.

In this process, interest is awarded on the two claims prior to set-off<sup>2</sup>. A similar approach would seem to be appropriate for set-off between at least most foreign currency claims under a contract, whether for debt or damages. This is, however, largely new territory and detailed discussion is outside the scope of this title<sup>3</sup>.

1 See *The Stoomvaart Maatschappij Nederland v The Peninsular and Oriental Steam Navigation Company, The Khedive* (1882) 7 App Cas 795 at 801, in the context of awards in sterling and fixed rates of interest. With the abandonment of the sterling-loss-date rule for conversion of foreign currencies the Admiralty Court, in *The Transoceanica Francesca and Nicos V* [1987] 2 Lloyd's Rep 155 adopted the proposal made in *MV Eleftherotria (Owners) v MV Despina R (Owners), The Despina R* [1978] QB 396 at 415, [1977] 3 All ER 874 at 889 for conversion as discussed in the text. Usually, the selection of the date for set-off will be straightforward as, in both-to-blame Admiralty actions, the issue of liability is usually resolved before damages are quantified. However, there is no reason in principle why damages may not be quantified first, whether by agreement, in a reference to the Admiralty Registrar, or by the Judge (see RSC Ord 75 r 41).

If the claims are resolved first, the set-off will clearly need to be deferred until blame has been apportioned, and it would seem that the relevant exchange rate should be that applying at the time of apportionment of blame. A slight complication may also arise if damages on a claim and cross-claim are quantified on different dates: then, set-off will need to take place as at the later date.

A different procedure applies where, in an Admiralty action, one party establishes an entitlement to limit its liability under the Merchant Shipping Act 1995. Then, a limitation fund reflects a single liability, is expressed in sterling, and attracts sterling interest rates (which are fixed by statutory instrument), despite the fact that the claim or claims (or the balance of claims after set-off, as the case may be) against the limiting party, may be expressed in one or more foreign currencies. In the event of limitation of liability, any foreign currency claim or judgment (or competing claims or judgments, as the case may be), would be converted into sterling as at the date of the limitation decree, both to demonstrate the inadequacy of the fund to satisfy the adverse claims and so that the mathematical basis for the distribution of the fund may be established. For a more detailed treatment of limitation of liability see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 1042 et seq.

2 *The Botany Triad and The Lu Shan* [1993] 2 Lloyd's Rep 259. This avoids the anomalies that could otherwise arise where currencies of different relative strengths have different interest rates.

3 See generally Wood *English and International Set-Off* (1st Edn, 1989).

## **UPDATE**

### **1132-1144 Damages in Foreign Currency**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/10. DAMAGES IN FOREIGN CURRENCY/1143. Enforcement of a foreign currency judgment.

### **1143. Enforcement of a foreign currency judgment.**

Where a judgment creditor seeks to enforce an English judgment debt which is expressed in a foreign currency he will, except in rare cases<sup>1</sup>, need to give evidence as to the sterling equivalent at the time of the application for enforcement process<sup>2</sup>.

Where a judgment creditor, as a first step towards enforcing in the jurisdiction a non-sterling judgment of a foreign court<sup>3</sup>, either registers<sup>4</sup> the foreign judgment, or sues<sup>5</sup> on it and obtains a judgment in England or Wales, he is then in possession of an English judgment which is capable of being enforced in the usual way.

1 For example if a judgment creditor seeks to enforce payment by garnishee proceedings directed against a bank account in the same currency as the judgment. Where the account is in a different foreign currency, the creditor will need to give evidence as to the value of the judgment debt in that currency. In *Choice Investments v Jeronimon* [1981] QB 149, [1981] 1 All ER 225, CA, the attachment by a garnishee order of the sterling proceeds of the judgment debtor's London US dollar bank account, to help satisfy a county court judgment expressed in sterling, was approved. Directions were given as to the procedure and form of order on the attachment of foreign currency accounts within the jurisdiction.

2 See *Practice Direction (Judgment: Foreign Currency)* [1976] 1 All ER 669, [1976] 1 WLR 83, as amended by *Practice Direction (Judgment: Foreign Currency) (No 2)* [1977] 1 All ER 544, [1977] 1 WLR 197 para 11 in relation to a writ of fieri facias; para 12 for garnishee proceedings; and PARA 14 for other modes of enforcement such as by obtaining an order imposing a charge on a beneficial interest under RSC Ord 50 r 1; or on securities (see Ord 50 r 2); or by obtaining an order for the appointment of a receiver by way of equitable execution (see Ord 51). See also CIVIL PROCEDURE.

3 For these purposes, 'a foreign court' includes a reference to the courts of Scotland and Northern Ireland.

4 As to registration see the Civil Jurisdiction and Judgments Act 1982 ss 4, 5, 18(8), Sch 6, Sch 7 (as amended); the Administration of Justice Act 1920 s 9; the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 1 (as amended); and RSC Ord 71. See also CIVIL PROCEDURE; CONFLICT OF LAWS

5 *Grant v Easton* (1883) 13 QBD 302, CA.

## **UPDATE**

### **1132-1144 Damages in Foreign Currency**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/10. DAMAGES IN FOREIGN CURRENCY/1144. Payment into court in a foreign currency.

### **1144. Payment into court in a foreign currency.**

A defendant may make a payment into court in a foreign currency either when, as of right, he pays foreign money into court in satisfaction of a plaintiff's claim where the claim is expressed in that foreign currency<sup>1</sup>, or in other circumstances when the court so directs or permits<sup>2</sup>.

Foreign currency may also be paid into court in an interpleader action<sup>3</sup>, or the Admiralty Marshal may lodge in court the foreign currency proceeds of sale of a ship<sup>4</sup>. Where foreign currency has been paid into court it will not be invested except on the application of a party<sup>5</sup>. The procedure governing the payment of foreign currency out of court is similar to that applying to sterling payments<sup>6</sup>.

1 In any action for debt or liquidated demand or damages any defendant may at any time pay into court a sum of money in satisfaction of the cause of action in respect of which the plaintiff claims or, where two or more causes of action are joined in the action, a sum or sums of money in satisfaction of any or all of those causes of action: see RSC Ord 22 r 1 (and, in an Admiralty action, Ord 75 r 24); the Court Funds Rules 1987, SI 1987/821, r 38(1)(i); and CIVIL PROCEDURE.

Where payment into court of a sum in foreign currency is made other than with immediate value (eg by a cheque drawn on a foreign bank), particular regard should be had to the period for clearance, as a defendant will not gain the intended protection in relation to costs if insufficient time is allowed: *Banco Fonsecas E Burnay SARL v KO Boardman International Ltd* [1985] 1 Lloyd's Rep 386.

2 Court Funds Rules 1987, SI 1987/821, r 38(1)(ii). After a payment has been made into court in a foreign currency, a party may apply for the money to be placed in an interest-bearing account in that or any other currency: see r 39(1). As to where foreign currency is paid into court under an order of the court see RSC Ord 22 r 8.

3 As to which see RSC Ord 17.

4 *The Halcyon the Great* [1975] 1 All ER 882, [1975] 1 Lloyd's Rep 518. As to orders for the sale of ships see RSC Ord 75 r 22.

5 *Practice Direction (Judgment: Foreign Currency)* [1976] 1 All ER 669, [1976] 1 WLR 83 as amended by *Practice Direction (Judgment: Foreign Currency) (No 2)* [1977] 1 All ER 544, [1977] 1 WLR 197; Court Funds Rules 1987, SI 1987/821, r 39. See also note 2 supra.

6 As to which see RSC Ord 22 r 3, 4. For Admiralty actions see Ord 75 r 24; and CIVIL PROCEDURE.

### **UPDATE**

### **1132-1144 Damages in Foreign Currency**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **1144 Payment into court in a foreign currency**

NOTE 1--Reference to RSC Ord 22 r 1 is now to CPR Pt 36 and reference to RSC Ord 75 r 24 is omitted: see SI 1987/821 r 38(1)(i); SI 1999/1021.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(1) PLEADING AND PROOF/1145. Pleading damage.

## **11. PRACTICE AND PROCEDURE**

### **(1) PLEADING AND PROOF**

#### **1145. Pleading damage.**

In a statement of claim<sup>1</sup>, the plaintiff must give particulars of special damage<sup>2</sup>, but need not give particulars of general damage<sup>3</sup> unless the damage is of a kind which is not the necessary and immediate consequence of the defendant's wrongful act<sup>4</sup>.

Thus if the plaintiff proposes to allege that there are special circumstances whereby damage has been suffered which would not ordinarily flow from the defendant's wrongful act he must plead those circumstances so that the defendant is not taken by surprise<sup>5</sup>.

<sup>1</sup> As to the contents and form of pleadings see CIVIL PROCEDURE.

<sup>2</sup> *Ratcliffe v Evans*[1892] 2 QB 524 at 528 per Bowen LJ (in order that there may be no surprise at the trial); *Bodley v Reynolds*(1846) 8 QB 779; *Davis v Oswell* (1837) 7 C & P 804; *Bluck v Lovering* (1885) 1 TLR 497; *Fleming v Bank of New Zealand*[1900] AC 577, PC; *Monk v Redwing Aircraft Co Ltd*[1942] 1 KB 182, [1942] 1 All ER 133, CA; *Hayward v Pullinger & Partners Ltd*[1950] 1 All ER 581, 94 Sol Jo 255; *Perestrello e Co Ltda v United Paint Co Ltd*[1969] 3 All ER 479, [1969] 1 WLR 570, CA.

<sup>3</sup> *Boorman v Nash* (1829) 9 B & C 145 at 152; *Smith v Thomas* (1835) 2 Bing NC 372 at 380; *London and Northern Bank Ltd v George Newnes Ltd* (1900) 16 TLR 433, CA.

<sup>4</sup> *Perestrello e Co Ltda v United Paint Co Ltd*[1969] 3 All ER 479 at 485, [1969] 1 WLR 570 at 579, CA, per Lord Donovan, where the plaintiffs failed to plead loss of profits from a breach of contract.

<sup>5</sup> *Domsalla v Barr (t/a AB Construction)* [1969] 3 All ER 487 at 492, [1969] 1 WLR 630 at 634, CA, per Edmund Davies LJ where, in a claim for damages for personal injuries, the plaintiff failed to plead that it had been his intention to set up in business on his own.

### **UPDATE**

#### **1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(1) PLEADING AND PROOF/1146. Matters to be specifically pleaded.

### **1146. Matters to be specifically pleaded.**

There are certain matters relating to damages which must be specifically pleaded. First, the pleading must disclose a complete cause of action<sup>1</sup>.

The cause of action relied upon in order to claim any given item of damage should be sufficiently particularised. An allegation of negligence by act is not the same or substantially the same as an allegation of negligent misstatement. Whether a pleading encompasses a particular claim depends upon whether its language adequately expressed the relevant cause of action<sup>2</sup>. The requirements of pleadings are to be strictly observed<sup>3</sup>. It is not acceptable to say that something is a 'mere pleading point'<sup>4</sup>. This is equally true where the deficiency relates to the adequacy of the pleading in relation to the claim for damages<sup>5</sup>.

Secondly, there are types of damages that must be expressly pleaded, which are dealt with elsewhere: exemplary damages<sup>6</sup>; aggravated damages<sup>7</sup>; special damages<sup>8</sup>; interim damages<sup>9</sup> and provisional damages<sup>10</sup>.

1 Thus where a party was said to have delayed several other contractors in performing their work, it was necessary to plead what individual delays had been caused, and at what cost. Failure to do so had the effect that the action was struck out on the basis that there was not a good claim. It was not good enough to seek a global figure for overall delay. These were considered material facts which ought to have been pleaded: *Wharf Properties v Eric Cumine Associates* (1989) 45 BLR 72, [1985] LRC (Comm) 401, HK CA.

2 *Hydrocarbons Great Britain Ltd v Cammell Laird Shipbuilders Ltd and Automotive Products plc (t/a AP Precision Hydraulics) and Redman Broughton Ltd and Black Cawson International Ltd (No 2)* (1991) 58 BLR 123.

3 *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 409 at 417, [1989] 1 WLR 1340 at 1352, CA, per May LJ (fraudulent conduct must be distinctly pleaded and as distinctly proved); revsd in part without reference to this point [1991] 2 AC 548, [1992] 4 All ER 512, HL.

4 *Farrell v Secretary of State for Defence* [1980] 1 All ER 166 at 173, [1980] 1 WLR 172 at 180 per Edmund-Davies LJ.

5 *Stocznia Gdanska SA v Latvian Shipping Co* [1997] 2 Lloyd's Rep 228 (amendment refused); revsd on the particular facts [1998] 1 All ER 883, HL. In an attempt to save the case, it was not acceptable to plead such a difficult alternative ground as restitution as an amendment to pleadings on appeal: *Godden v Merthyr Tydfil Housing Association* [1997] NPC 1, CA.

6 See PARA 1147 post.

7 See PARA 1148 post.

8 See PARA 1149 post.

9 See PARAS 926-929 ante.

10 See PARA 930 ante.

## **UPDATE**

### **1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(1) PLEADING AND PROOF/1147. Exemplary damages.

**1147. Exemplary damages.**

The claimant must specifically plead any claim for exemplary damages, together with the facts on which he relies<sup>1</sup>. The assertion of such a claim needs to be made in the body of the claim and not just in the prayer, because all of the facts giving rise to the claim must be set out.

<sup>1</sup> RSC Ord 18 r 8(3).

**UPDATE**

**1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(1) PLEADING AND PROOF/1148. Aggravated damages.

**1148. Aggravated damages.**

Where the plaintiff's claim is for aggravated damages<sup>1</sup>, the pleading should contain a statement to that effect and should set out the facts on which he relies in support of his claim for such damages. The County Court Rules provide<sup>2</sup> that aggravated damages are to be expressly claimed and that the plaintiff is to plead the facts which are relied upon in support of his claim to such damages. The Rules of the Supreme Court<sup>3</sup> do not expressly require that aggravated damages be pleaded, but by application of general principles the plaintiff is required to plead those special facts relied upon in support of the claim.

1 See generally paras 1111-1119 ante.

2 CCR Ord 6 r 1B.

3 RSC Ord 18 r 8(3).

**UPDATE**

**1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(1) PLEADING AND PROOF/1149. Special damages.

**1149. Special damages.**

In respect of special damages<sup>1</sup>, if the plaintiff fails to plead any matter of damage which ought to have been pleaded, evidence will not be able to be adduced in respect of it unless the court grants leave for an amendment of the pleadings<sup>2</sup>. If no special damages are pleaded, they cannot be recovered.

There are particular requirements in actions for personal injuries<sup>3</sup>.

1 As to the distinction between general and special damages see PARA 812 ante.

2 *Ilkiw v Samuels* [1963] 2 All ER 879, [1963] 1 WLR 991, CA; *Perestrello e Co Ltda v United Paint Co Ltd* [1969] 3 All ER 479, [1969] 1 WLR 570, CA; cf *Domsalla v Barr* (t/a *AB Construction*) [1969] 3 All ER 487, [1969] 1 WLR 630, where the defendant had taken no objection to the evidence.

3 See PARA 878 et seq ante.

**UPDATE**

**1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(1) PLEADING AND PROOF/1150. Pleading the defence.

### **1150. Pleading the defence.**

The primary function of pleading the defence is to disclose a reasonable defence<sup>1</sup>. Every pleading must contain, and only contain, a statement in summary form of the material facts on which the defendant relies for its defence<sup>2</sup>. The defendant is required to plead the matters<sup>3</sup> which are relied upon in support of a contention of performance, release, the expiry of any period of limitation, fraud, or illegality which in the defendant's contention makes any claim made by the other side unsustainable, or which if not specifically pleaded might take the other side by surprise, or which raises an issue of fact not raised by the pleading<sup>4</sup>.

The bare allegation that a plaintiff has suffered damage is deemed to have been specifically traversed. However there is no deemed traverse as to the amount of damages<sup>5</sup>, and the pleading should set out the facts and matters relied upon by the defendant in relation to its contentions as to the amount. If the defendant wishes to put in issue questions of remoteness, foreseeability, or of the appropriate measure of damages, it should be done in the body of the pleading setting out the facts which are relied upon<sup>6</sup>.

Equally the defendant is required to plead that the plaintiff has failed to mitigate if he intends to put forward such a case at trial<sup>7</sup>. Though the burden on the plaintiff of showing mitigation is considered to be relatively light, this does not excuse the defendant from raising specifically the facts and matters relied upon by him as showing that there has been a failure to mitigate.

One difficulty confronting the pleader for the defendant is in deciding whether to admit or deny a particular head of damage or item of loss. If the intention is merely to put the plaintiff to proof, then non-admission is the appropriate response. Sometimes, however, the defendant may wish to go further. In a claim for a quantum meruit the defendant may want to allege that the works were not done at all. In a personal injury action, the defendant may wish to say that the plaintiff is not suffering the pain and suffering alleged. In such cases the defendant ought specifically to plead such matters. This is because he is putting forward a positive case, and the facts relied upon ought to be pleaded. Moreover, such an allegation is one of fraud, which must always be specifically pleaded<sup>8</sup>.

1 See RSC Ord 18 rr 19(1), 7(1).

2 See RSC Ord 18 r 7(1).

3 See RSC Ord 18 r 8 (matters which must be pleaded in pleadings subsequent to the statement of claim).

4 See RSC Ord 18 r 8.

5 See RSC Ord 18 r 12(1)(c).

6 See RSC Ord 18 r 12(9).

7 See RSC Ord 18 rr 12(1)(c), 8(1)(b), (c). As to special rules in relation to the pleading of mitigation in the context of libel and slander actions see *Plato Films Ltd v Speidel* [1961] AC 1090, [1961] 1 All ER 876, HL.

8 See RSC Ord 18 r 8(1); *Smith v Chadwick* (1884) 9 App Cas 187; *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 409 at 417, [1989] 1 WLR 1340 at 1352, CA, per May LJ (fraudulent conduct must be distinctly pleaded and as distinctly proved) (revsd in part without reference to this point [1991] 2 AC 548, [1992] 4 All ER 512, HL).

### **UPDATE**

## **1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **1150 Pleading the defence**

NOTE 7--For the admission of evidence when pleading mitigation in the context of libel and slander actions see *Burstein v Times Newspapers Ltd* [2001] EWCA Civ 97, [2001] 1 WLR 579; *Turner v News Group Newspapers Ltd* [2006] EWCA Civ 540, [2006] 4 All ER 613. See further LIBEL AND SLANDER vol 28 (Reissue) PARA 237.

NOTE 8--See *Cooper v P & O Stena Ltd* [1999] 1 Lloyd's Rep 734.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(1) PLEADING AND PROOF/1151. Degree of particularity required.

### **1151. Degree of particularity required.**

The degree of particularity required as to the pleading of damages is increasingly the subject matter of express provision of the rules of court, though the general principles as to pleading set out above remain applicable<sup>1</sup>.

In the High Court, the statement of claim must contain a statement in a summary form of the material facts on which the pleading party relies in its claim or defence<sup>2</sup>.

In the county court the claim must specify both the cause of action and the remedy sought, stating briefly the material facts on which the pleader relies<sup>3</sup>.

Where the plaintiff is obliged to plead his damage, the degree of particularity required will depend upon the facts of each case<sup>4</sup>. The object of pleading is to prevent the other side being taken by surprise, to enable the parties to know what evidence to obtain, to limit and define the issues between the parties, and to give the defendant notice of the case which he has to meet so that he can prepare for trial and if necessary make a payment into court<sup>5</sup>. Those matters which must be pleaded in respect of damages are covered elsewhere<sup>6</sup>. Although minute accuracy is not expected the pleading should make clear what measure of damage is relied on<sup>7</sup> and, if the plaintiff is able to base his claim on a precise calculation, he must give the defendant access to the facts which make that calculation possible<sup>8</sup>. If the plaintiff fails to give the particulars required the defendant should seek an order for particulars or for further and better particulars<sup>9</sup>.

Subject to the obligation to give proper particulars, which in many instances will involve pleading specific sums of money such as expenditure incurred, there is no requirement to specify the sum of money claimed as damages unless the claim is for liquidated damages<sup>10</sup>.

In both county court and High Court proceedings it is necessary to limit the claim to the appropriate band. In the county court, the court's jurisdiction is limited by statute and the limitation is needed to clarify that the court has jurisdiction to hear and determine the claim and also to determine whether the case is one which could be heard by a District Judge<sup>11</sup>.

Where, in county court proceedings, no amount has been specified the court may allow an amendment limiting damages to an amount within the court's jurisdiction<sup>12</sup>. In the High Court the limitation on the damages is necessary as it affects the level of fee to be paid on issue. It is essential also that the appropriate certification of value be made in a High Court claim.

<sup>1</sup> See PARA 1145 ante.

<sup>2</sup> RSC Ord 18 r 7(1).

<sup>3</sup> CCR Ord 6 r 1.

<sup>4</sup> *Ratcliffe v Evans* [1892] 2 QB 524, CA; *Perestrello e Co Ltda v United Paint Co Ltd* [1969] 3 All ER 479 at 486, [1969] 1 WLR 570 at 580, CA, per Lord Donovan.

<sup>5</sup> *Domsalla v Barr (t/a AB Construction)* [1969] 3 All ER 487 at 492, [1969] 1 WLR 630 at 634, CA, per Edmund Davies LJ; *Monk v Redwing Aircraft Co Ltd* [1942] 1 KB 182, [1942] 1 All ER 133, CA.

<sup>6</sup> As to the pleading of aggravated, exemplary and special damages see PARAS 1146-1148 ante. As to interim and provisional damages see PARAS 926-930 ante.

<sup>7</sup> *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873, [1951] WN 205.



8 *Perestrello e Co Ltda v United Paint Co Ltd* [1969] 3 All ER 479 at 486, [1969] 1 WLR 570 at 579, CA, per Lord Donovan.

9 See RSC Ord 18 r 12(3); and CIVIL PROCEDURE.

10 *London and Northern Bank Ltd v George Newnes Ltd* (1900) 16 TLR 433, CA.

11 As to the jurisdiction of the County Court and the High Court generally see COURTS.

12 *Legon v Count* [1945] KB 391, [1945] 1 All ER 710, CA.

## **UPDATE**

### **1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(1) PLEADING AND PROOF/1152. Proof of damage.

### **1152. Proof of damage.**

A plaintiff who alleges that damage has been suffered has the burden of proving not only that he has suffered the damage, but also its extent or amount<sup>1</sup>. Where, however, the defendant alleges that the plaintiff should have mitigated his loss<sup>2</sup> or that his loss has in fact been diminished or avoided<sup>3</sup>, the burden of proving such matters rests upon the defendant. Though the onus in respect of mitigation is on the defendant it is not a duty which the courts treat as especially onerous. The duty of the plaintiff is merely to act reasonably. The plaintiff will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken<sup>4</sup>.

In general, the plaintiff must prove his damage on a balance of probabilities<sup>5</sup>. In many cases, however, the court is called upon to evaluate chances, such as the chance that a plaintiff will suffer further loss or damage in the future. In such cases, where the issue is not one of past historical fact, the plaintiff need only establish that he has a reasonable, as distinct from a speculative, chance of suffering such loss or damage; the court must then assess the value of that chance<sup>6</sup>.

1 *Bonham-Carter v Hyde Park Hotel Ltd* [1948] WN 89, [1948] 64 TLR 177; *Ashcroft v Curtin* [1971] 3 All ER 1208, [1971] 1 WLR 1731, CA (evidence of a decrease in the profitability of a company was so vague that it was quite impossible to quantify the loss and no damages were awarded under this head); *Fordham v Christie, Manson & Woods Ltd* [1977] 2 EGLR 9 at 13 per May J. But cf note 5 infra.

2 *Roper v Johnson* (1873) LR 8 CP 167 at 181 per Brett J; *James Finlay & Co v NV Kwik Hoo Tong Handel Maatschappij* [1928] 2 KB 604 at 614 per Wright J (affd [1929] 1 KB 400, CA); *Banco de Portugal v Waterlow* [1932] AC 452 at 506 per Lord Macmillan. See also PARAS 859, 1041 et seq ante.

3 *The World Beauty* [1970] P 144, [1969] 3 All ER 158, CA; para 1044 ante.

4 See generally para 1044 ante.

5 Cf the presumption which may arise in favour of the plaintiff in bailment cases, in certain actions in tort for wrongs to chattels, and in contract cases where the damage (if any) sustained is rendered incalculable and conjectural by the defendant's wrongdoing. As to bailment see PARA 1088 et seq ante; as to tort see PARA 851 et seq ante; and as to contract see 941 et seq ante.

6 *Davies v Taylor* [1974] AC 207, [1972] 3 All ER 836, HL, a claim under the fatal accidents legislation, where it was held that a reconciliation between the plaintiff and her husband was only a speculative possibility and not a reasonable possibility such as to justify an award of damages. As to fatal accidents see PARA 932 et seq ante.

### **UPDATE**

#### **1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(2) PRACTICE ON ASSESSMENT OF DAMAGES/1153. General principles.

## (2) PRACTICE ON ASSESSMENT OF DAMAGES

### 1153. General principles.

The award of damages is in the form of a sum of money which is to be a once and for all payment of compensation<sup>1</sup>. Where, as may happen particularly in personal injury cases, damages are awarded in respect of the damage which the plaintiff may suffer in the future, the court has no power to make a further award if the damage actually suffered is greater than expected. If such a situation is liable to occur, the court may try the issue of liability first and postpone the trial of the issue of damages until the prognosis is firmer<sup>2</sup>. The court also has power in personal injury cases to order the defendant to make an interim payment on account of damages<sup>3</sup>, and there are special provisions relating to the exchange of medical reports<sup>4</sup>.

In many cases the court should itemise the damages awarded. This is particularly so in personal injury cases where different elements of the award carry different rights to interest<sup>5</sup>. Where separate causes of action are tried together, but the damage suffered is the same, only one award of damages will be made<sup>6</sup>. Where the damage suffered is distinct, even though similar, it seems that one single award may be made if the parties do not object; otherwise separate awards should be made<sup>7</sup>. If damages are to be assessed in respect of any continuing cause of action, this must be done down to the time of assessment<sup>8</sup>.

Where a plaintiff has claimed a specific sum for damages, or has limited his claim to a specific sum, the court may not award greater damages unless the plaintiff obtains leave to amend his pleadings<sup>9</sup>. If the claim is for liquidated damages the court is not called upon to assess damages at all, but must find for the agreed sum<sup>10</sup>.

1 See PARA 833 ante. For exceptions to this general principle see PARA 878 et seq ante.

2 See RSC Ord 33 r 4; Ord 35 r 3; Ord 37 rr 1, 4; and CIVIL PROCEDURE. See also *Stevens v William Nash Ltd*[1966] 3 All ER 156, [1966] 1 WLR 1550, CA (uncertainty about the plaintiff's future); *Hawkins v New Mendip Engineering Ltd*[1966] 3 All ER 228, [1966] 1 WLR 1341, CA (risk of major epilepsy developing). In *Coenen v Payne*[1974] 2 All ER 1109, [1974] 1 WLR 984, CA, it was said that the court should be ready to order separate trials in personal injury cases wherever it was just and convenient; and that having regard to the time and expense which would be involved in trying this case (which was concerned with the possible future earnings of a German national in Germany) the issue of liability should be tried first.

3 See PARAS 926-929 ante.

4 See the Civil Evidence Act 1972 s 2(3)(a); RSC Ord 38 r 37. The court may also stay a plaintiff's action if he unreasonably refuses to be medically examined by a doctor on behalf of the defendant: *Edmeades v Thames Board Mills Ltd*[1969] 2 QB 67, [1969] 2 All ER 127, CA; cf *Baugh v Delta Water Fittings Ltd*[1971] 3 All ER 258, [1971] 1 WLR 1295.

5 *Jefford v Gee*[1970] 2 QB 130 at 151, [1970] 1 All ER 1202 at 1212, CA, per Lord Denning MR. As to the award of interest see PARA 848 ante.

6 This course will be followed eg in personal injury cases where the causes of action may be a breach of statutory duty and negligence, but the damage is one and the same.

7 See *Barber v Pigden*[1937] 1 KB 664, [1937] 1 All ER 115, CA; cf *Weber v Birkett*[1925] 2 KB 152, CA, where the defendant had paid into court a separate sum in respect of each cause of action, as he was required to do by the rules then in force as to payment into court, but the jury had returned a verdict for a lump sum to cover both causes of action.

8 RSC Ord 37 r 6.

9 *Wyatt v Rosherville Gardens Co* (1886) 2 TLR 282; *Chattell v Daily Mail Publishing Co Ltd* (1901) 18 TLR 165, CA.

10 *Lowe v Peers* (1768) 4 Burr 2225 at 2229; *Farrant v Olmius* (1820) 3 B & Ald 692; *Crisdee v Bolton* (1827) 3 C & P 240.

## **UPDATE**

### **1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **1153 General principles**

NOTE 7--There should be no hard and fast rule whether separate heads of damage for harassment should be made for psychiatric harm, injury to feelings and aggravated damages; it all depends on the facts of the individual case: *Choudhary v Martins*[2007] EWCA Civ 1379, [2008] 1 WLR 617. Where discriminatory acts fall into distinct categories of discrimination, damages for injury to feelings have to be considered separately in respect to each incident of discrimination: *Al Jumard v Clywd Leisure Ltd*[2008] IRLR 345, EAT.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(2) PRACTICE ON ASSESSMENT OF DAMAGES/1154. Interim payments and provisional damages.

**1154. Interim payments and provisional damages.**

Interim payments<sup>1</sup> and provisional damages<sup>2</sup> in personal injury cases are discussed elsewhere in this title.

1 See PARA 926 ante.

2 See PARA 930 ante.

**UPDATE**

**1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(2) PRACTICE ON ASSESSMENT OF DAMAGES/1155. Mode of assessment.

### **1155. Mode of assessment.**

Most actions are tried by a judge alone<sup>1</sup>, who will often assess the damages. The judge may, however, call in the aid of one or more assessors specially qualified, and try and hear the case wholly or partially with their assistance<sup>2</sup>. The assessment of damages may also be referred to a circuit judge discharging official referees' business<sup>3</sup>, to a special referee or to a master<sup>4</sup>, and this may be an appropriate course where the assessment is essentially a matter of calculation. In jury trials the assessment is made by the jury, it being the judge's duty to direct it on the principles applicable<sup>5</sup>.

Where, in a claim for unliquidated damages, the defendant consents to judgment being entered against him, or admits facts, by his pleadings or otherwise, which entitle the plaintiff to judgment<sup>6</sup>, the court may enter interlocutory judgment against the defendant and order that damages be assessed. Similarly, where the defendant fails to give notice of his intention to defend<sup>7</sup> or defaults in, for instance, serving a defence<sup>8</sup>, the court may enter interlocutory judgment against him and order that damages be assessed. Further, where the defendant has no defence to the claim, the court may enter summary judgment against him and order that damages be assessed<sup>9</sup>. In all these instances in actions in the Chancery or Queen's Bench Division the assessment of damages<sup>10</sup> will normally be by a master<sup>11</sup>, but the court may order that the assessment be referred to a circuit judge discharging official referees' business<sup>12</sup> or to a special referee, or that the action proceed to trial before a judge, with or without a jury, as respects the damages<sup>13</sup>.

Where in an action against several defendants interlocutory judgment has been entered against some defendants in default of appearance or defence, and the action proceeds against other defendants, then, unless the court otherwise orders, damages are assessed at the trial<sup>14</sup>.

Where judgment is given in the Chancery Division or in the Queen's Bench Division for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall be assessed<sup>15</sup> by a master or, as appropriate, by the Admiralty Registrar<sup>16</sup>.

1 Normally only claims in respect of fraud, libel, slander, malicious prosecution or false imprisonment are tried by jury: see the Supreme Court Act 1981 s 69. Trial by jury will not be ordered in personal injury cases unless there are exceptional circumstances: *Ward v James* [1966] 1 QB 273, [1965] 1 All ER 563, CA. See also *Rothermere v Times Newspapers Ltd* [1973] 1 All ER 1013, [1973] 1 WLR 448, CA; *Williams v Beesley* [1973] 3 All ER 144, [1973] 1 WLR 1295, HL.

2 See the Supreme Court Act 1981 s 70; RSC Ord 33 r 6. See also *Southport Corpn v Esso Petroleum Co Ltd* [1956] AC 218, [1953] 2 All ER 1204 at 1206; *revsd sub nom Esso Petroleum Co Ltd v Southport Corpn* [1956] AC 218 at 222, [1953] 2 All ER 1204, HL. As to assessors in county court proceedings see the County Courts Act 1984 s 63 (amended by the Courts and Legal Services Act 1990 s 14); CCR Ord 13 r 11; and CIVIL PROCEDURE.

3 As to the discharge of the functions of official referees by circuit judges see the Supreme Court Act 1981 s 68 (amended by the Administration of Justice Act 1982 s 59). As to references generally for assessment of damages see RSC Ord 37 r 4.

4 RSC Ord 36. Appeal from a decision of a master or special referee lies to the Court of Appeal: Ord 58 rr 2, 5. No appeal lies from a decision of a circuit judge discharging official referees' business except upon a point of law or a question of fact relevant to a charge of fraud or breach of professional duty: Ord 58 r 4.

5 On the question of remoteness of damage, and the respective functions of the judge and jury see *Mehmet Dogan Bey v G G Abdeni & Co Ltd* [1951] 2 KB 405, [1951] 2 All ER 162.

6 As to judgment on admission of facts see RSC Ord 27 r 3; and CIVIL PROCEDURE. See also *Blundell v Rimmer* [1971] 1 All ER 1072, [1971] 1 WLR 123, where in an action for damages for negligence the defendant admitted negligence but denied that the plaintiff had suffered any damage. It was held that the plaintiff was not entitled to interlocutory judgment since the cause of action for negligence had two elements, negligence and damage, only one of which had been admitted.

7 See RSC Ord 13; and CIVIL PROCEDURE.

8 See RSC Ord 19 rr 3, 4, 6. The defendant may also default in making discovery of documents or in answering interrogatories, whereupon the court may order the defence to be struck out and judgment entered accordingly: RSC Ord 24 r 16(1); Ord 26 r 6(1); and CIVIL PROCEDURE.

9 See RSC Ord 14 r 3; and CIVIL PROCEDURE.

10 See RSC Ord 37 rr 1-4 applies in relation to a judgment for the value of goods to be assessed with or without damages to be assessed as it applies to a judgment for damages to be assessed, and references in those rules to the assessment of damages are to be construed accordingly: Ord 37 r 5.

11 See RSC Ord 37 r 1, which provides that where a judgment for damages to be assessed makes no provision as to how they are to be assessed, the damages are (subject to Ord 37) to be assessed by a master, or, in Admiralty cases, by the Admiralty Registrar. The party entitled to the benefit of the judgment may, after obtaining an appointment from the master and, at least seven days before the appointment, serving notice of the appointment on the other side proceed accordingly. The notice must be served in all cases, notwithstanding Ord 65 r 9 (which dispenses with service in certain cases). Provision is made for compelling the attendance of witnesses and the production of documents and as to the application to proceedings before the master: see Ords 35, 37. Where, in pursuance of Ord 37 or otherwise, damages are assessed by a master, he must certify the amount: see Ord 37 r 2.

In the Queen's Bench Division the proceedings before the master are public: *Hesz v Sotheby & Co (Practice Note)* [1960] 1 WLR 285. In the Chancery Division damages are assessed in chambers.

An appeal from the decision of a Queen's Bench master lies to the Court of Appeal: see RSC Ord 58 r 2(1)(b).

12 As to appeals see RSC Ord 58 r 5; and note 4 supra.

13 See RSC Ord 37 r 4. Where the court orders that the action shall proceed to trial, Ord 25 rr 2-7 (with the omission of so much of r 7(1) as requires the parties to serve a notice specifying the orders and directions which they desire and with any other necessary modification), applies as if the application in pursuance of which the order was made were a summons for directions under Ord 25.

14 RSC Ord 37 r 3. This provision now applies where judgment is given in default of intention to defend: Rules of the Supreme Court (Writ and Appearance) 1979, SI 1979/1716.

15 Subject to the remainder of RSC Ord 37.

16 The provisions of RSC Ord 37 apply equally to judgments for the value of goods to be assessed.

## **UPDATE**

### **1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **1155 Mode of assessment**

NOTES--In personal injury cases involving a substantial claim for future loss of earnings and disputed medical evidence, it is inappropriate for a district judge to assess damages; such cases should be heard by a circuit judge: *Sandry v Jones* (2000) Times, 3 August, CA.

NOTES 1-3--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 2--1990 Act s 14 repealed: Statute Law (Repeals) Act 2004.

NOTE 3--1981 Act s 68 further amended: Civil Procedure Act 1997 Sch 2 para 1(3);  
Constitutional Reform Act 2005 Sch 4 para 131.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(2) PRACTICE ON ASSESSMENT OF DAMAGES/1156. Compromise.

### **1156. Compromise.**

A party who is sui juris claiming damages may compromise or settle the claim at any stage before, during or after the conclusion of litigation, and no approval of the court is required<sup>1</sup>. Where, however, damages are claimed by or on behalf of a person under disability, that is to say a minor<sup>2</sup> or a patient<sup>3</sup>, no settlement, compromise or payment and no acceptance of money paid into court, whenever entered into or made, is valid, insofar as it relates to that person's claim, without the approval of the court<sup>4</sup>. Notwithstanding this, where the individual authorised to act in the name of the person under a disability has also been authorised by the Court of Protection to consent to the dismissal of an appeal to the Court of Appeal, the appeal may be dismissed without a hearing<sup>5</sup>.

1 See generally CIVIL PROCEDURE. As to compromise in county court proceedings see CCR Ord 10 r 10.

2 A minor is a person under the age of 18 years: see the Family Law Reform Act 1969 s 1; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 1.

3 I.e. a person who, by reason of disability within the meaning of the Mental Health Act 1983 s 1(2), is not able to manage and administer his property and affairs: see RSC Ord 80 r 1.

4 RSC Ord 80 r 10(1), which applies to all proceedings in any division of the High Court except proceedings in respect of which special rules apply (eg matrimonial proceedings): Ord 1 r 2. For corresponding provision as to proceedings in the county court see CCR Ord 10 r 10. The court's approval is required whether the claim is made by the person under disability alone or in conjunction with any other person. If a minor comes of age before judgment in High Court proceedings a notice may be filed to indicate that the age of majority has been reached and that the proceedings have been adopted; and RSC Ord 80 r 10 will then cease to apply. See CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1422.

5 RSC Ord 59 r 23.

### **UPDATE**

#### **1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(2) PRACTICE ON ASSESSMENT OF DAMAGES/1157. Applying for approval for a settlement.

### **1157. Applying for approval for a settlement.**

In the Queen's Bench Division the application for approval of a settlement which has been reached after proceedings have begun is usually made by summons to a master in chambers<sup>1</sup>. The master will consider all the circumstances of the case and, if he approves the settlement, he will also give directions as to the control of the money recovered<sup>2</sup> and, where necessary, its apportionment<sup>3</sup>. If the settlement is reached before proceedings have begun and it is desired to obtain the court's approval, an originating summons must be made<sup>4</sup>. If the settlement is reached at or during the trial, application for approval should be made to the trial judge.

Where after trial and judgment a settlement is reached whilst an appeal to the Court of Appeal is pending, the Court of Appeal has seisin over the matter, and must approve the settlement<sup>5</sup>. Similarly, if a settlement is reached after the Court of Appeal has disposed of the case, and whilst an appeal to the House of Lords is pending, the settlement must be approved by the House of Lords<sup>6</sup>.

1 In the Chancery Division applications for approval are made to a judge in chambers.

2 RSC Ord 80 r 12. See PARA 1160 post.

3 ie between the dependants in a claim under the Fatal Accidents Act 1976: RSC Ord 80 r 15.

4 See RSC Ord 80 r 11.

5 *Walsh v George Kemp Ltd* [1938] 2 All ER 266, 82 Sol Jo 254, CA.

6 *Flack v Withers* [1961] 3 All ER 388n, [1961] 1 WLR 1284, HL; *Leather v Kirby* [1965] 3 All ER 927n, [1965] 1 WLR 1489, HL.

### **UPDATE**

#### **1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(2) PRACTICE ON ASSESSMENT OF DAMAGES/1158. Approval for costs.

### **1158. Approval for costs.**

In cases where the court's approval is required it is also necessary for the costs of the plaintiff, or, if more than one, of all the plaintiffs, to be taxed both as between party and party and as between solicitor and own client<sup>1</sup>. No costs are payable to the solicitor for any plaintiff except as certified on taxation<sup>2</sup>. Where the amount allowed on the taxation of the bill of any plaintiff's solicitor exceeds the amount allowed on the taxation of any costs payable to that plaintiff, the amount of excess must be certified and, where necessary, the proportion of the excess payable respectively by any party under disability and any other party<sup>3</sup>.

Before giving approval, the court will wish to know about the circumstances of the case in detail, and to be satisfied with the acceptability of the proposed settlement or compromise<sup>4</sup>, although weight will be given to the views of the guardian ad litem and to legal advisers.

The practice forms should be used in all cases where the approval of the master is sought in compromising an action<sup>5</sup>. In the event that the court is not prepared to approve the settlement or compromise, directions may be given for the further prosecution of the action. In the same way, the court can adjourn the application so as to provide the opportunity for further negotiations.

<sup>1</sup> See RSC Ord 62 r 16. This rule applies equally whether the damages are recovered by judgment or settlement. To avoid such taxation a defendant, in settling a claim, will often agree to pay costs on the common fund basis, and the plaintiff's solicitor will agree to waive the excess, if any, between those costs and costs taxed on a solicitor and own client basis. A defendant may also agree to pay costs on a solicitor and own client basis, thus enabling him to agree the costs with the plaintiff's solicitor and avoid a taxation.

As to costs in the case of compromise of county court proceedings see CCR Ord 10 r 11(4)-(6).

<sup>2</sup> RSC Ord 62 r 16(2).

<sup>3</sup> RSC Ord 62 r 16(3).

<sup>4</sup> *Re Barbour's Settlement Trusts* [1974] 1 All ER 1188, [1974] 1 WLR 1198; and see Foskett *The Law and Practice of Compromise* (4th Edn, 1996) PARA 2-03).

<sup>5</sup> The appropriate forms are set out in Foskett *The Law and Practice of Compromise* (4th Edn, 1996) pp 459-467.

### **UPDATE**

#### **1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(2) PRACTICE ON ASSESSMENT OF DAMAGES/1159. Structured settlements.

**1159. Structured settlements.**

Structured settlements in personal injury cases are discussed elsewhere in this title<sup>1</sup>.

<sup>1</sup> See PARA 931 ante.

**UPDATE**

**1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(2) PRACTICE ON ASSESSMENT OF DAMAGES/1160. Control and investment of damages.

### **1160. Control and investment of damages.**

Once a party who is sui juris has actually recovered damages he may spend or invest them as he pleases. Where, however, money is recovered by or on behalf of, or adjudged or ordered or agreed to be paid to, or for the benefit of, a person under disability, that is to say a minor or patient, or money paid into court is accepted by or on behalf of a person under disability, the money must be dealt with in accordance with directions given by the court<sup>1</sup>. These directions will relate to the investment of the money and the manner in which it is to be applied and paid for the benefit of the person under disability<sup>2</sup>.

If a settlement is approved, the order of the court should direct by and to whom the money is to be paid, and how the money is to be applied or otherwise dealt with<sup>3</sup>.

Where money is recovered on behalf of a person under a disability, or money paid into court is accepted, the money can be dealt with in accordance with the appropriate rules and not otherwise<sup>4</sup>. The court may give directions that the money or part of it is to be paid into the High Court and invested or otherwise dealt with there<sup>5</sup>. Directions may include general or special directions that the court thinks fit to give, including how the money is to be applied or dealt with, and as to how any payment is to be made to plaintiff, his next friend or his legal advisers<sup>6</sup>. These provisions relate to any such proceedings, irrespective of form or division.

The options open to the court are extremely wide, to enable it to invest the sum in the most appropriate way. The governing principle is that the sum should be invested so as to fit with the policy decided on for the application for the money<sup>7</sup>. The general aims for the fund will be determined by the master and will be specifically indorsed on the back of the Practice Form. It will be the task of the investment managers of the Public Trustee Office to seek to devise an investment plan or scheme in accordance with that expressed aim. Cases can be brought back to the master for periodical review.

1 See RSC Ord 80 r 12(1): see further CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1424. As to county court proceedings see CCR Ord 10 r 11; and CIVIL PROCEDURE.

2 The directions may provide that the whole or any part of the damages be paid into court and invested or otherwise dealt with there: RSC Ord 80 r 12(2). Where money is paid into court on behalf of a child in accordance with directions given under r 12(2), the court may appoint the Official Solicitor to be a guardian of the estate of the child provided that: (1) the appointment is to subsist only until the child reaches 18 years of age; and (2) the consent of persons with parental responsibility for the child has been signified to the court or, in the opinion of the court, cannot be obtained or may be dispensed with: RSC Ord 80 r 13.

The directions may also include general or special directions that the court thinks fit to give, in particular directions as to how the money is to be applied or dealt with. The court may also make directions as to any payment to be made, either directly or out of the amount paid in, to the plaintiff, to his next friend in respect of money paid or expenses incurred for or on behalf of or for the benefit of the person under disability or for his maintenance or otherwise, or to the plaintiff's solicitor in respect of costs: see Ord 80 r 12(3). Money paid into court, including any interest on it, may not be paid out, and securities in which it is invested or dividends on them may not be sold, transferred or paid out, except in accordance with a court order: Ord 80 r 12(4). These provisions also apply, with the necessary changes, to a counterclaim by a person under disability: see Ord 80 r 12(5).

3 RSC Ord 80 r 12; In cases where it was necessary for the court to give approval because the plaintiff was a person under a disability, *Practice Note (Structured Settlements: Court's Approval)* [1992] 1 All ER 862, [1992] 1 WLR 328 would apply.

4 RSC Ord 80 r 12.

5 RSC Ord 80 r 12(2).

6 RSC Ord 80 r 12(3).

7 A list of the types of investments commonly thought to be appropriate in are fully set out in RSC Ord 80 r 12(11).

## **UPDATE**

### **1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(3) APPEALS/1161. Appeal from award by judge alone.

### (3) APPEALS

#### 1161. Appeal from award by judge alone.

An appeal from an award of damages made by a judge sitting without a jury<sup>1</sup> or by a master<sup>2</sup> is by way of rehearing<sup>3</sup>, and the Court of Appeal may reduce or increase the damages awarded. The Court of Appeal will not, however, vary the award unless it is satisfied that the judge acted upon some wrong principle of law<sup>4</sup>, misapprehended the facts<sup>5</sup>, or that the amount awarded was a wholly erroneous estimate<sup>6</sup>. Thus it is not sufficient that the Court of Appeal would itself have awarded a different sum if it had been sitting as the court of first instance<sup>7</sup>. Neither is it sufficient to show that one item of damages is wholly erroneous if it cannot be shown that the total award is wholly erroneous<sup>8</sup>, but if the appeal court thinks the damages are radically wrong it ought to interfere even though the error cannot be pinpointed<sup>9</sup>. Similar principles will apply if there is a further appeal to the House of Lords.

Although it is a general principle that damages are assessed once and for all at the time of the trial even though the plaintiff may subsequently suffer greater or lesser loss than was anticipated, an appellate court has power to receive further evidence, particularly of matters which have occurred after the date of trial<sup>10</sup>. This power is, however, exercised sparingly<sup>11</sup>.

The occasions when the Court of Appeal is likely to involve itself in questions of damages are comparatively rare. Damages are, in essence, a question of fact rather than of law. Appeals on damages are therefore generally confined to rare cases where either the court applies the wrong measure of damages or where further findings were not open to the judge on the facts. The latter category is comparatively rare because the Court of Appeal is reluctant to upset findings of fact without good reason.

Moreover, the Court of Appeal is reluctant to interfere with assessments of general damages save in cases where the trial judge has applied the wrong principle or is otherwise clearly wrong<sup>12</sup>.

1 In county court proceedings, if the plaintiff has claimed damages of £5,000 or less, there is in general no right of appeal against an assessment of damages except on a point of law: see CIVIL PROCEDURE.

2 There is a right of appeal against the assessment of damages by a special referee: RSC Ord 58 r 6, but not against the assessment by a circuit judge exercising official referees' functions, unless it is on a point of law or a question of fact relevant to a charge of fraud or breach of professional duty: RSC Ord 58 r 5.

3 RSC Ord 59 r 3. As a rule the rehearing is a rehearing on the documents, such as the transcript of evidence or, if this is not available, the judge's notes. In personal injury cases the Court of Appeal will not generally examine a plaintiff's physical condition, save in such cases as scarring or shortening of a limb: *Stevens v William Nash Ltd*[1966] 3 All ER 156, [1966] 1 WLR 1550, CA.

4 See *Yorkshire Electricity Board v Naylor*[1968] AC 529, [1967] 2 All ER 1, HL; *Taylor v O'Connor*[1971] AC 115, [1970] 1 All ER 365, HL.

5 *Kerry v Carter*[1969] 3 All ER 723 at 726, [1969] 1 WLR 1372 at 1376, CA, obiter per Lord Denning MR.

6 *Flint v Lovell*[1935] 1 KB 354, CA; *Owen v Sykes*[1936] 1 KB 192, [1935] All ER 90, CA; *Davies v Powell Duffryn Associated Collieries, Ltd*[1942] AC 601 at 617, [1942] 1 All ER 657 at 664, HL, per Lord Wright, and at 624 and 668 per Lord Porter; *Wilson v Pilley*[1957] 3 All ER 525, [1957] 1 WLR 1138, CA; *Brown v Thompson*[1968] 2 All ER 708, [1968] 1 WLR 1003, CA; *Hinz v Berry*[1970] 2 QB 40, [1970] 1 All ER 1074, CA. The Court of Appeal is reluctant to interfere with comparatively small awards by county courts: *Kansara v Osram (GEC) Ltd*[1967] 3 All ER 230, CA. See also *Bone v Seale*[1975] 1 All ER 787, [1975] 1 WLR 797, CA.

7 *Owen v Sykes*[1936] 1 KB 192, [1935] All ER 90, CA; *Nance v British Columbia Electric Rly Co Ltd*[1951] AC 601, [1951] 2 All ER 448, PC.

8 *Povey v WE & E Jackson (a firm)*[1970] 2 All ER 495, [1970] 1 WLR 969, CA; explained in *George v Pinnock*[1973] 1 All ER 926, [1973] 1 WLR 118, CA.

9 *Kerry v Carter*[1969] 3 All ER 723, [1969] 1 WLR 1372, CA; *Radburn v Kemp*[1971] 3 All ER 249, [1971] 1 WLR 1502, CA.

10 As to the Court of Appeal's powers in this respect see RSC Ord 59 r 10(2). The House of Lords also has such power: *Murphy v Stone Wallwork (Charlton) Ltd*[1969] 2 All ER 949, [1969] 1 WLR 1023, HL.

11 *Curwen v James*[1963] 2 All ER 619, [1963] 1 WLR 748, CA, (claim under the fatal accidents legislation; evidence allowed of widow's remarriage soon after trial (which would now be disregarded under the Fatal Accidents Act 1976 s 3(3) (substituted by the Administration of Justice Act 1982 s 3(1)): see PARA 937 ante); *Jenkins v Richard Thomas and Baldwins Ltd*[1966] 2 All ER 15, [1966] 1 WLR 476, CA (evidence of inability to manage anticipated work); *Murphy v Stone Wallwork (Charlton) Ltd*[1969] 2 All ER 949, [1969] 1 WLR 1023, HL (where damages for personal injuries were assessed on the basis that the plaintiff would continue to work for the defendants, but he was dismissed shortly after the hearing in the Court of Appeal); *Mulholland v Mitchell*[1971] AC 666, [1971] 1 All ER 307, HL (where the plaintiff had to go into a nursing home, at greater expense than anticipated, shortly after trial); *Beaton v Naylor of Plymouth* (1965) 109 Sol J 632, CA (where a new trial was ordered); *McCann v Sheppard*[1973] 2 All ER 881, [1973] 1 WLR 540, CA (where the plaintiff died four months after the trial).

12 There is a trend towards a more flexible approach, according to which the success or failure of an appeal will depend on whether the trial judge's assessment fell within the range permissible for the particular type of award: see *Moeliker v A Reyrolle & Co Ltd*[1977] 1 All ER 9 at 19, [1977] 1 WLR 132 at 144, CA, per Stephenson LJ (where the award was held 'just far enough below ... to need correction'; see also *Spittle v Bunney*[1988] 3 All ER 1031, [1988] 1 WLR 847, CA: here, the Court of Appeal was asked to consider a two-part award, where two separate amounts were awarded for the physical and for the psychological effects of an injury. The Court held that the trial judge's award of £3,000 for the former was high enough to appeal, and reduced it to £1,500, but allowed £5,000 for the latter to stand).

## UPDATE

### 1145-1164 Practice and Procedure

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.



Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(3) APPEALS/1162. Appeal from award by jury.

### **1162. Appeal from award by jury.**

Where damages have been assessed by a jury the position is different from that where damages have been assessed by a judge<sup>1</sup>. An aggrieved party's remedy is to apply to the Court of Appeal to set aside the jury's award and order a new trial<sup>2</sup>. This may be a trial of all the issues in the action or be limited to the assessment of damages<sup>3</sup>.

The Court of Appeal, however, now has the power to substitute its own figure for the sum awarded by the jury in any case where it has the power to order a new trial on the ground that the damages awarded are excessive or inadequate<sup>4</sup>.

The power to substitute its own award is, however, limited to cases where the ground for the Court of Appeal's interference is that the jury's award was excessive or inadequate. Where the ground for interference is that there has been a misdirection or other error on the part of the trial judge, or misconduct as to damages by the jury, the appellate court has no general power to substitute its own figure<sup>5</sup>. Its only option is to order a new trial.

Appeals against decisions of juries in questions of damages have become marginally easier to mount. This is due to the appellate court's recent tendency to lay down guidelines to assist juries in arriving at an appropriate level of damages<sup>6</sup>. Thus, for example, in defamation actions guidance has been given as to how questions of damages should be put to the jury<sup>7</sup>.

<sup>1</sup> *Scott v Musial* [1959] 2 QB 429, [1959] 3 All ER 193, CA. As to appeals from an award by a judge alone see PARA 1161 ante.

<sup>2</sup> Supreme Court Act 1981 s 17(1). Section 17(2) provides that the application may be heard and determined by the High Court if the trial was by a judge alone, and no error of the courts is alleged, or in other prescribed cases.

<sup>3</sup> RSC Ord 59 r 11(3); and see *Tolley v JS Fry & Sons Ltd* [1931] AC 333, HL; *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156, [1971] 1 WLR 1239, HL. The court may order the fresh assessment to be made by a judge alone in cases where there is a discretion as to the mode of trial: *Ward v James* [1966] 1 QB 273 at 301, [1965] 1 All ER 563 at 575, CA, per Lord Denning MR.

<sup>4</sup> See the Courts and Legal Services Act 1990 s 8(2); and RSC Ord 59 r 11(4).

<sup>5</sup> *Watt v Watt* [1905] AC 115, HL. There are two exceptions to this general rule: first, where all parties consent (*Smith v Schilling* [1928] 1 KB 429, CA; *Nance v British Columbia Electric Rly Co Ltd* [1951] AC 601 at 617, [1951] 2 All ER 448 at 451, PC); secondly, where a distinct head of damages has been erroneously included in or excluded from the jury's award (*Lionel Barber & Co Ltd v Deutsche Bank (Berlin) London Agency* [1919] AC 304, HL, where it was held that the only effect of a misdirection might have been to lead the jury to award £460 more than it should have done, and that since the plaintiff consented the court could reduce the award by this amount. In that case no assessment of damages by the court was involved and therefore the jury's province was not invaded).

<sup>6</sup> *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153, [1990] 1 All ER 269, CA; considered in *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, [1993] 4 All ER 975, CA.

<sup>7</sup> *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153, [1990] 1 All ER 269, CA; considered in *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, [1993] 4 All ER 975, CA.

## **UPDATE**

### **1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

**1162 Appeal from award by jury**

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 6--See *Thompson v Metropolitan Police Comr* [1998] QB 498, applied in *Clark v Chief Constable of Cleveland Constabulary* (1999) Times, 13 May, CA (application of guidelines relating to damages for malicious prosecution).

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(3) APPEALS/1163. Grounds upon which a new trial may be ordered.

### **1163. Grounds upon which a new trial may be ordered.**

The grounds upon which a new trial may be ordered fall into two categories. First, the Court of Appeal may order a new trial if there has been an error by the judge such as the misdirection or inadequate direction of the jury as to the measure of damages<sup>1</sup>, or the improper admission or rejection of evidence. The Court of Appeal is not, however, bound to order a new trial on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge was not asked to leave to the jury, unless some substantial wrong or miscarriage has been thereby occasioned<sup>2</sup>.

Secondly, a new trial may be ordered where the Court of Appeal is satisfied that, having regard to all the circumstances, the damages awarded are so high or so low that no reasonable jury, properly directed, could have awarded such a sum<sup>3</sup>. It is not sufficient that the Court of Appeal would have awarded a different sum itself<sup>4</sup>. Instead it must be shown that the award is out of all proportion to the facts of the case<sup>5</sup>. This matter has been expressed otherwise as meaning that the verdict must be an 'impossible' one or to represent an entirely erroneous estimate, or to have applied the wrong measure of damages<sup>6</sup>. As particular examples of the rule the Court of Appeal may order a new trial where it is satisfied that the jury has been guilty of misconduct<sup>7</sup>, made some gross blunder<sup>8</sup>, been misled by the speeches of counsel<sup>9</sup>, or taken into account matters which the jury ought not to have taken into account or disregarded matters which it ought to have taken into account<sup>10</sup>.

The Court of Appeal has a discretion as to whether to grant a new trial. In exercising that discretion it may impose such conditions as it considers appropriate with the aim of avoiding an injustice<sup>11</sup>. Inevitably those factors which are likely to weigh heavy with the court will include the delay and cost involved in a new trial taking place. A decision to order a new trial will therefore not be taken lightly.

In place of ordering a new trial, the Court of Appeal may be empowered in such classes of case as the rules may specify, to substitute for the sum awarded by the jury such sum of damages as appears to the court to be proper<sup>12</sup>.

1 *Blake v Midland Rly Co* (1852) 18 QB 93; *Knight v Egerton* (1852) 7 Exch 407; *Hadley v Baxendale* (1854) 9 Exch 341; *Rowley v London and North Western Rly Co* (1873) LR 8 Exch 221; *English and Scottish Co-operative Properties Mortgage and Investment Society Ltd v Odhams Press Ltd* [1940] 1 KB 440, [1940] 1 All ER 1, CA; *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523, [1965] 1 WLR 805, CA; *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156, [1971] 1 WLR 1239, HL; *Riches v News Group Newspapers Ltd* [1986] QB 256, [1985] 2 All ER 845, CA. Cf cases where it was held that there had been no misdirections sufficient to impugn the jury's award (although all three awards were held excessive): see *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153, [1990] 1 All ER 269, CA; *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, [1993] 4 All ER 975, CA; *John v MGN Ltd* [1997] QB 586, [1996] 2 All ER 35, CA.

2 See RSC Ord 59 r 11(2); and *Bray v Ford* [1896] AC 44, HL; *Anderson v Calvert* (1908) 24 TLR 399, CA; *Floyd v Gibson* (1909) 100 LT 761, CA; *Lionel Barber & Co Ltd v Deutsche Bank (Berlin) London Agency* [1919] AC 304, HL; *Warren v King* [1963] 3 All ER 521, [1964] 1 WLR 1, CA; *Riddick v Thames Board Mills Ltd* [1977] QB 881, [1977] 3 All ER 677, CA; *Pamplin v Express Newspapers Ltd* [1988] 1 All ER 282, [1988] 1 WLR 116n, CA.

3 *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL; *Mallett v McMonagle* [1970] AC 166, [1969] 2 All ER 178, HL; *Praed v Graham* (1889) 24 QBD 53, CA; *Mechanical and General Inventions Co and Lehwess v Austin and The Austin Motor Co* [1935] AC 346, HL; *Greenlands Ltd v Wilmshurst and London Association for the Protection of Trade* [1913] 3 KB 507 at 529, 532, 563, CA (revsd on another point sub nom *London Association for the Protection of Trade v Greenlands Ltd* [1916] 2 AC 15, HL); *Lewis v Daily Telegraph Ltd* [1963] 1 QB 340, [1962] 2 All ER 698, CA (affd sub nom *Rubber Improvement Ltd v Daily Telegraph Ltd* [1964] AC 234, [1963] 2 All ER 151, HL); *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86, [1964] 3

All ER 947, CA. The question which the Court of Appeal must ask is 'could a reasonable jury have thought that this award was necessary to compensate the plaintiff and to re-establish his reputation?': *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670 at 692, [1993] 4 All ER 975 at 994, CA, per Neill LJ.

4 *Mechanical and General Inventions Co and Lehwess v Austin and the Austin Motor Co* [1935] AC 346 at 378, HL, per Lord Wright; *Praed v Graham* (1889) 24 QBD 53 at 55, CA, per Lord Esher MR.

5 *Bocock v Enfield Rolling Mills Ltd* [1954] 3 All ER 94, [1954] 1 WLR 1303, CA; *Mechanical and General Inventions Co and Lehwess v Austin and The Austin Motor Co* [1935] AC 346 at 378 per Lord Wright, citing Palles CB in *M'Grath v Bourne* [1876] IR 10 CL 160 at 164 (to justify setting aside the verdict the amount should be such that no reasonable proportion existed between it and the circumstances of the case); *Taff Vale Rly Co v Jenkins* [1913] AC 1 at 7, HL, per Lord Atkinson; *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL.

6 *Banbury v Bank of Montreal* [1918] AC 626 at 717, HL, where an award made by the jury on a conditional basis was held improper, and a retrial ordered.

7 *Wood v Gunston* (1655) Sty 462; *Ash v Ash* (1695) Comb 357; *Beardmore v Carrington* (1764) 2 Wils 244. A new trial may be ordered where the jury has made a compromise: *Falvey v Stanford* (1874) LR 10 QB 54.

8 *Praed v Graham* (1889) 24 QBD 53 at 55, CA, per Lord Esher MR.

9 *Praed v Graham* (1889) 24 QBD 53 at 55, CA, per Lord Esher MR; *Chattell v Daily Mail Publishing Co Ltd* (1901) 18 TLR 165, CA (jury misled by counsel's speech, and also awarded a sum in excess of the amount claimed); *Hodge v Matlock Bath and Scarthin Nick UDC and Nuttall* (1910) 75 JP 65, CA (sum in excess of the amount claimed awarded).

10 *Phillips v London and South Western Rly Co* (1879) 5 QBD 78, CA; *Johnston v Great Western Rly Co* [1904] 2 KB 250, CA; *Smith v Schilling* [1928] 1 KB 429, CA. See also *Armytage v Haley* (1843) 4 QB 917; *Blanchfield v Murphy* [1912] 47 ILTR 24; *Karavias v Callinicos* [1917] WN 323, CA; *Chapman v Ellesmere* [1932] 2 KB 431, CA.

11 *Watt v Watt* [1905] AC 115, HL; *Wing Lee v Lew* [1925] AC 819, PC.

12 Courts and Legal Services Act 1990 s 8(2); RSC Ord 59 r 11(4).

## UPDATE

### 1145-1164 Practice and Procedure

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

Halsbury's Laws of England/DAMAGES (VOLUME 12(1) (REISSUE))/11. PRACTICE AND PROCEDURE/(3) APPEALS/1164. Costs.

### **1164. Costs.**

The costs of and incidental to proceedings of the Supreme Court are in the discretion of the court, and a court has full power to determine by whom and to what extent costs are to be paid<sup>1</sup>. The court may disallow or order the legal or other representative to meet the whole or part of any wasted costs<sup>2</sup>.

Essentially a defendant in an action has two weapons at his disposal when seeking to protect his costs position in the face of an inflated damages claim. The first is to pay into court. The second, to be used in circumstances where a payment into court is not appropriate or effective, is by sending a Calderbank letter<sup>3</sup>, written without prejudice save as to costs. Costs in respect of contribution have been discussed earlier<sup>4</sup>.

1 See the Supreme Court Act 1981 s 51 (substituted by the Courts and Legal Services Act 1990 s 4(1)); and RSC Ord 62. See further CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

2 In context wasted costs means any costs incurred by a party (1) as a result of any improper unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or (2) which in the light of any act or omission occurring after they were incurred the court considers it unreasonable to expect that party to pay. The Supreme Court Act 1981 s 51 (as substituted) also provides for a reduction of up to 25% in circumstances where an action is commenced in the High Court which should have been commenced in the County Court.

As to the exercise of the court's discretion on costs generally see RSC Ord 62 r 2(9). See also *Langley v North West Water Authority* [1991] 3 All ER 610, [1991] 1 WLR 697, CA, where the plaintiff's solicitors failed to comply with a local practice direction, and were ordered by the County Court to pay the costs of certain applications by the defendant.

3 *Calderbank v Calderbank* [1975] 3 All ER 333, [1975] 3 WLR 586. The procedure is set out in RSC Ord 62 r 27; see CIVIL PROCEDURE.

4 See PARA 847 ante.

## **UPDATE**

### **1145-1164 Practice and Procedure**

RSC and CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

### **1164 Costs**

NOTES 1, 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).